No. 508

IN THE

SUPREME COURT OF THE UNITED STATES

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens of the State of Colorado, taxpayers and electors therein, for themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLORADO, HOMER BEDFORD AS TREASURER OF THE STATE OF COLORADO, AND BYRON ANDERSON, AS SECRETARY OF STATE OF THE STATE OF COLORADO,

Appellees.

JURISDICTIONAL STATEMENT AND APPENDICES

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INDEX

	PAGE
Jurisdictional Statement	1
Questions Presented by Appeal	12
Statement of the Case (included as above)	12
Substantiality of grounds	22
Appendix A, Memorandum Opinion, August 10, 1962	29
Appendix B, Majority Opinion, July 10, 1963	46
Appendix B(1), Minority Opinion, July 10, 1963	81
Appendix C, Chapter 63, 1953 Colorado Revised Statutes	95

CITATIONS

Baker vs. Carr, 369 U.S. 186, 82 S. Ct. 691	6, 21, 22
Colorado Investment And Realty Co. vs. Riverview Drainage Dist., 83 Colo. 468, 266 Pac. 501	24
Dixon vs. People, 53 Colo. 527, 127 Pac. 930	22
Gamewell vs. Strumpler, 84 Colo. 459, 271 Pac. 180	24
Gray vs. Sanders, 83 S. Ct. 801	6, 20, 23
McConnell vs. Frink, No. 610, October Term, 1962	7
Mann vs. Davis, 213 F. Supp. 577 (E.D., Va., 1962) No. 797, October Term, 1962	7, 26
Maryland Committee for Fair Representation vs. Tawes, 228 Md. 412, 180 A. 2d 656; 229 Md. 318, 182 A. 2d 887; 229 Md. 406, 184 A. 2d 715; No 554, October Term, 1962	7

INDEX (CONTINUED)

	PAGE
Reynolds vs. Sims, No. 508, October Term, 1962	7
Scholle vs. Hare, 116 N.W.2d 350, 367 Mich. 176	27
Simcock vs. Duffy, 215 F. Supp. 169	20
Sims vs. Frink, 205 F. Supp. 245, 208 F. Supp. 431. (M.D. Ala., 1962)	6
Van vs. Frink, No. 540, October Term, 1962	7
Wesberry vs. Vandiver (Wesberry vs. Sanders), 206 F. Supp. 276 (N.D., Ga. 1962), No. 507, October Term, 1962	7
W.M.C.A. vs. Simon, 202 F. Supp. 741 (S.D., N.Y., 1962); 270 U.S. 190 (1962); 208 F. Supp. 368 (S.D.N.Y., 1962); No. 460, October Term, 1962	7
Wrights vs. Rockefeller, 211 F. Supp. 460 (S.D., N.Y., 1962), No. 950, October Term, 1962	7
Fourteenth Amendment to the Constitution of The United States	Passim
28 USCA 1253	2, 6
28 USCA 2101	4, 6
Colorado Constitution, Article V, Sections 45, 46, 47, 1 CRS 307	8
Colorado Constitution, Amendent No. 7, 1962	9 and passim
Chapter 63, Article I, 1953 CRS, Volume 3, page 728 et seq.	10 and App. C

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Appellees.

JURISDICTIONAL STATEMENT

Come now the Appellants above named, by their counsel, and, under and in pursuance of Rule 15 of the Rules of the Supreme Court make the following Jurisdictional Statement.

1(a). This Appeal arises from and upon the Judgment of the United States District Court for the District of Colorado, sitting as a Court of three judges properly convoked under the statutes in such cases applicable, in its consolidated actions, being *Archie L. Lisco, et al. vs. John Love, et al.*, No. 7501, and *William E. Myrick, et al. vs. The Forty-Fourth General Assembly of the State of*

Colorado, et al., No. 7637, which opinion and judgment were rendered and entered July 16, 1963, and which is not yet reported. Theretofore, on August 10, 1962, the same Court of three judges, in the same action, had rendered a Memorandum Opinion, which appears reported in 208 F. Supp. 471, under the title *Lisco vs. McNichols*. That Memorandum Opinion appears in Appendix A, hereinafter, and the Opinion of the Court, which constitutes as well its findings and conclusions, together with the dissenting Opinion of Judge Doyle, appear hereinafter as Appendix B and B(1), respectively.

1(b). The grounds upon which the jurisdiction of this Honorable Court is invoked are as follows:

I. This is a proceeding on appeal from a final judgment of a three-judge Court, involving a denial of injunctive and other equitable relief with reference to the alleged unconstitutionality of Statutes and a Constitutional provision of the State of Colorado, and the appeal is taken under and in pursuance of Section 1253, 28 USCA, as follows:

> "#1253. Direct appeals from decisions of three-judge courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The action is one which directly involves the question of legislative apportionment, and the constitutional validity, under the Fourteenth Amendment to the Consti-

tution of the United States, of the Constitution of the State of Colorado, as it makes provisions for that apportionment, and the statutes of the State of Colorado relating thereto. A constitutional provision of the State of Colorado, and statutes enacted pursuant thereto, existing from the time of Statehood to the year 1962, required reapportionment after each state census and after each decennial federal census. Essentially no such apportionment was had, a gross distortion in apportionment developed, and the existing statutes were declared by the three-judge Court to be unconstitutional, in the Memorandum Opinion (Appendix A) above referred. Thereafter, the Constitution was amended, with the purpose of observing the rule of representation by population as concerns the House of Representatives, but removing the Senate entirely from that basis of selection, and providing for its election from perpetually frozen districts, now having a representational distortion in many cases approximating 4 to 1, and perpetually freed from the requirement of apportionment on a population basis.

The matters presented for determination are directly related to the questions presented in some six sets of proceedings in which jurisdiction was assumed by the Supreme Court during October term, 1962. The questions are fundamental questions under the equal protection and due process provisions of the Fourteenth Amendment ultimately resolvable only by action of the Supreme Court of the United States. In essence, the question involves a determination whether the populace of any state, by vote and alteration of a State constitution, may deprive other and non-consenting portions of the population of fundamental rights of suffrage and representation claimed by

them as citizens of the United States under the Fourteenth Amendment.

The time of appeal is submitted to be governed by Title 28, Section 2101, USCA:

"#2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment, or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

...."

II. Applicable dates of proceedings in the District Court of the United States are as follows:

1. The initial Memorandum opinion of the Court was issued August 10, 1962, and appears on pages 31 and 354 of the Record. (Appendix A)

2. Thereafter, further pleadings and further trial thereon having been had, there was entered on July 16,

1963, a Memorandum Opinion and Order signed by Hon. Jean S. Breitenstein, United States Circuit Judge, Tenth Circuit, assigned, and Hon. Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado. That opinion appears at page 153 of the record. (Appendix B)

3. Concurrently, and on July 16, 1963, there was filed a dissenting opinion by Hon. William E. Doyle, Judge of the United States District Court for the District of Colorado. That dissenting opinion appears at page 191. (Appendix B(1))

4. Orders of Dismissal were entered on the same date, in pursuance of the majority opinion, and appear in the record on pages 205 and 206.

5. On August 1, 1963, there was filed by the Plaintiff (here appellant) Andres Lucas a Notice of Appeal to the Supreme Court of the United States, with return of service endorsed, appearing at page 387 of the record.

6. On August, 1963, there was filed by the Plaintiff (here appellant) Archie L. Lisco a Notice of Direct Appeal to the Supreme Court of the United States, appearing at page 397.

6. On September 5, 1963, the Clerk of the United States District Court transmitted to the Clerk of the Supreme Court of the United States the record in the within matters, as designed in the Notices of Appeal and in a Counterdesignation of Record.

III. It is believed and submitted that jurisdiction of the appeal is conferred upon this Court by Title 28 USCA,

#1253, and by #2101, Title 28 USCA, each quoted herein and immediately above.

IV. Cases believed to sustain the jurisdiction of this Court are as follows:

The problems presented in the instant appeal are essentially problems of equal protection of the laws, and of due process, under the Fourteenth Amendment to the Constitution of the United States, and as required to be embodied in the Constitution of Colorado, by virtue of the Enabling Act in pursuance of which that State Constitution was authorized to be adopted. The jurisdictional arguments are essentially discussed in *Baker vs. Carr*, 369 U.S. 186, 82 S.Ct. 691, and as repeated at length in *Gray vs. Sanders*, 83 S.Ct. 801, ... U.S. .....

Subsequent to the decision in Baker vs. Carr, supra, numerous cases have arisen in the State Courts of ultimate jurisdiction and in the United States District Courts of many jurisdictions, in which three-judge Courts have been convoked to determine rather similar questions. In the October term, 1962, this Court accepted jurisdiction in several sets of such cases, some four sets involving directly the question of legislative apportionment, and two other sets of cases involving the kindred question of Congressional districting. Those cases, pending in Supreme Court of the United States, are as follows:

1. Relating to Legislative Apportionment:

(a). ALABAMA: *Sims vs. Frink*, reported in 205 F. Supp. 245, 208 F. Supp. 431 (M.D. Ala., 1962), and pending in the Supreme Court as *Reynolds vs. Sims*, No.

508, *Van vs. Frink*, No. 540, and *McConnell vs. Frink*, No. 610, all October term, 1962.

(b). MARYLAND: *Maryland Committee For Fair Representation vs. Tawes*, reported in 228 Md. 412, 180 A.2d 656; 229 Md. 317, 182 A.2d 877; and 229 Md. 406, 184 A.2nd 715, and pending in the Supreme Court as a single action, No. 554, October Term, 1962.

(c). NEW YORK: *W. M. C. A. vs. Simon*, reported in 202 F. Supp. 741 (S.D.N.Y., 1962); 270 U.S. 190 (1962); and 208 F. Supp. 368 (S.D.N.Y., 1962), and pending in the Supreme Court as a single action, No. 460, October Term, 1962.

(d). VIRGINIA: *Mann vs. Davis*, 213 F. Supp. 577 (E.D.VA., 1962), and pending in the Supreme Court as a single action, No. 797, October Term, 1962.

2. Relating to Congressional Districting:

(a). GEORGIA: *Wesberry vs. Vandiver* (*Wesberry vs. Sanders*), 206 F. Supp. 276 (N.D. Ga., 1962), pending in the Supreme Court as No. 507, October Term, 1962.

(b). NEW YORK: *Wright vs. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y., 1962), pending in the Supreme Court as Docket No. 950, October Term, 1962.

V. Several provisions of the Constitution of the State of Colorado, and several sections of its Statutes, are pertinent to the within matter:

1. Article V, Sections 45, 46, and 47 are basic to the

present controversy. They are found in Volume I, 1953, Colorado Revised Statutes, on page 307, as follows:

"Section 45. Census.—The general assembly shall provide by law for an enumeration of the inhabitants of the state, in the year of our Lord 1885, and every tenth year thereafter; and at the session next following such enumeration, and also at the session next following an enumeration made by authority of the United States, shall revise and adjust the apportionment for Senators and Representatives, on the basis of such enumeration according to ratios to be fixed by law.

"Section 46. Number of members of general assembly.—The senate shall consist of not more than thirty-five and the house of not more than sixty-five members.

"Section 47. Senatorial and representative districts.—Senatorial and representative districts may be altered from time to time, as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the district as compact as may be. No county shall be divided in the formation of a senatorial or representative district."

2. Those provisions of the Colorado Constitution purportedly have been amended by an Amendment, commonly referred to as Amendment No. 7, placed on the ballot at the elections of November 6, 1962, adopted at that election, but not yet officially published in the statutes or supplements of the State of Colorado. The Amendment text is set out in the Supplemental Complaint, paragraph

4 (Record, page 372), and is admitted to be correctly so set out. The amendment is as follows:

"AN ACT TO AMEND ARTICLE V OF THE STATE CONSTITUTION PROVIDING FOR THE APPORTIONMENT OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY AND PROVIDING FOR SENATORIAL DISTRICTS AND REPRESENTATIVE DISTRICTS.

"SECTION 1. Sections 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47, and 48 of Article V are adopted, to read as follows:

"Section 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

"Section 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

"Section 47. SENATE. The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now

provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson, and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder, and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

"Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to, conform to the requirements of Section 45, 46, and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be provided by law.

"The ballot title and submission clause to the pro-

posed initiative amendment to the constitution petitioned for herein as designated and fixed by the Secretary of State, Attorney General and Report of the Supreme Court is as follows, to-wit:

"AN ACT TO AMEND ARTICLE V OF THE STATE CONSTITUTION PROVIDING FOR A SENATE OF 39 MEMBERS AND A HOUSE OF 65 MEMBERS; PROVIDES FOR 65 REPRESENTATIVE DISTRICTS TO BE SUBSTANTIALLY EQUAL IN POPULATION; FOR SENATORIAL DISTRICTS APPORTIONING SENATORS AS NOW PROVIDED BY LAW, AND ONE ADDITIONAL SENATOR IS APPORTIONED TO ADAMS, ARAPAHOE, BOULDER AND JEFFERSON COUNTIES; ELBERT COUNTY BEING DETACHED FROM ARAPAHOE COUNTY AND ATTACHED TO A DISTRICT WITH ADJOINING COUNTIES; PROVIDES FOR SENATORIAL DISTRICTS OF SUBSTANTIALLY EQUAL POPULATION WITHIN COUNTIES WITH MORE THAN ONE SENATOR; FOR REVISION OF DISTRICTS BY THE GENERAL ASSEMBLY IN 1963, AND AFTER EACH DECENNIAL CENSUS THEREAFTER, UNDER PENALTY OF LOSS OF COMPENSATION AND ELIGIBILITY OF MEMBERS TO SUCCEED THEMSELVES IN OFFICE."

3. The statutory provision referred to in the said Amendment, Section 63-1-3, 1953 Colorado Revised Statutes, appears in Chapter 63, Article I, 1953 CRS, in Volume 3, page 728. The entire Chapter 63 is pertinent in this matter, and is appended hereto, as Appendix C.

QUESTIONS PRESENTED BY APPEAL

Inasmuch as the questions presented by this appeal are comprehensible only in the light of the history of this litigation, some statement of the background fact must be made in order that the presentation be intelligible. Little or no controversy relative to facts exists in the present case. The problems presented are essential problems of constitutional law.

A. Two original Complaints were filed by the present Appellants and others in the United States District Court for Colorado. Those persons, being public officials, citizens, and taxpayers of Colorado, appeared for themselves and representatively of others similarly situate, presenting action against the General Assembly, Governor, Secretary of State, and Treasurer of Colorado, and seeking injunctive and other relief as might be proper with reference to legislative apportionment in Colorado. That Complaint filed by Appellant Lucas was filed on July 9, 1962, and requested convocation of a three-judge Court. It alleged that Colorado exists under a Constitution adopted pursuant to Enabling Act of the Congress of the United States and subject to the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. It was alleged that one of the inalienable rights of citizenship in the United States and the State of Colorado is equality of franchise and of vote, and that the concept of equal protection of the laws requires that every citizen be equally represented in the legislature of his State. Those allegations were denied. The denial is of the essence of this proceeding.

1.1. It was, however, admitted that the then consti-

tution of Colorado, sections 45, 46, and 47, Article V, as first above set forth, required decennial state census in 1885 and thereafter, which census had never been taken; and required reapportionment of both houses of the state legislature after each such census, and in the session next following the United States Census. It was admitted that no such reapportionment had been made following the 1960 Census.

1.2. The following statistical allegations were made and proven, without dispute, from the Census, admitted by stipulation in evidence:

1.21. The population of Colorado in 1960 was 1,753,947. Each of its 35 senators, therefore, should have represented 50,113 persons, and each of its 65 representatives should have represented 26,984 persons. General population had increased 32.4% over 1950 population, but urban population had increased by 55.5%, while rural population *declined* 6.6% during the decennium.

1.22. Population in the largest Senate District, Jefferson County, was 127,520; that of the smallest Senate District, the 18th, was 17,481. Each citizen in that smaller district, then, was accorded representation approximately eight (8) times that in the largest district.

1.23. In like manner, a nine-to-one discrimination obtained between the most heavily represented House district and the least heavily represented such district.

1.24. In several districts, both House and Senate, representation was allowed and existed even though there were fewer persons within such districts than the statutorily prescribed minima for representation.

1.25. 29.8% of the population of Colorado, situate in its least populous Senatorial Districts, elected a majority of the Senate, and 32.1% of the population, in similarly unpopulated areas, elected the majority of the House of Representatives.

1.26. The Denver Metropolitan Area, consisting of Denver, Adams, Jefferson, Arapahoe, and Boulder Counties, were grossly misrepresented or under-represented. On average, a senator from one of the seven most populous districts represented 90,309 persons, nearly twice the number proper as shown in 1.21 above, while one from one of the eighteen least populous districts, electing the majority of the Senate, represented 39,013 persons, resulting in an average discrimination against the populated areas of 3 to 1. In the Metropolitan area itself, the City and County of Denver was favored over the surrounding counties in the ratio of 2 to 1, and similar conditions to those pertaining in the Senate obtained also in the House of Representatives.

1.3. It was admitted, and specifically found by the Trial Court in the first of its Memoranda Opinions that like conditions had obtained for many years, and that there has been a historial reluctance on the part of the General Assembly in Colorado to correct the situation.

2. The action was set for trial and final disposition on August 10, 1962. The Court rendered a unanimous per curiam opinion, Appendix A, in which it found essentially the facts above, and also held the resultant situation unconstitutional and violative of the Fourteenth Amendment. The Court held further that it could not act prior to the

then-impending November elections, and reserved the matter for further proceedings shortly after those elections.

3. The Court permitted during the trial intervention of the persons interested in forwarding Amendment 7, and almost all testimony presented was testimony as to what would be accomplished by that Amendment if it were adopted, so that the holdings relative to invalidity of the existing statutory arrangements, referentially incorporated in the Amendment, were made fully in contemplation of the possibility of the Amendment passage. Proponents of the amendment were allowed full participation in the August, 1962, hearings; they took part in every trial state; and they presented then substantially every matter at the subsequent hearings presented in favor of their position.

4. Amendment 7, the text of which was set forth above, was adopted at the November elections.

5. Following those elections, and that adoption, amendment of the pleadings was permitted, by filing of Supplemental Complaints, raising constitutional questions, under the Fourteenth Amendment, occasioned by the adoption of the said Amendment 7.

6. The Supplemental Complaint incorporated the allegations of the Complaint, and made parallel objections to the provisions of Amendment 7. Essentially, that Amendment provides for a House of Representatives of 65 members, to be elected from districts "as nearly equal as may be", and to be decennially reapportioned, each member to be elected from a single-member district. It provides for a Senate of 39, rather than 35, members, the

4 additional members being arbitrarily assigned to Adams, Jefferson, Arapahoe, and Boulder Counties. The other senatorial districts remain fixed in the same manner previously in this action declared by the District Court unconstitutional. The districts are perpetually frozen, regardless of population or population change, and are unrelated to population, except that if they are multi-member districts — most being single member — they are required, within the district, to be decennially reapportioned upon the basis of population. The statute, declared void by the Memorandum Opinion, is incorporated in the Constitutional Amendment, and prohibited to be repealed or modified, as regards most of its particulars.

6.1. The Supplemental Complaints allege and Appellants contend that the Amendment is wholly invalid, in that it accepts and recognizes the principle of equal representation as to the House of Representatives, while denying that validity of that principle in the Senate, except as to the multi-member districts in the Senate. The Senate is frozen, in perpetuity, upon the basis of an apportionment judicially declared to be "irrational" and without fundamental historial or other basis in fact or law. Perpetual detachment from population fact is submitted to be wholly impermissible. Distinction between the single-member rural districts and the multi-member urban and metropolitan ones within the Senate arrangement is totally capricious. Resultantly, the Amendment is as a whole arbitrary, capricious, and invidious discrimination, particularly in the light of the fact that, as shown by Article V, Sections 45, 46, and 47, existing in the same form from the inception of statehood until 1962, Colorado has never recognized any basis other than a population

basis, for the selection of members either of the Senate or the House of Representatives. No basis, other than population, exists or has ever existed in Colorado for such districting or selection.

6.2. The distinctions made by the amendment are, in the light of equal protection requirements under the Fourteenth Amendment, invidious, discriminatory, and without basis in history, logic or reason, for which reasons it is contended that the Amendment is in its totality void:

6.21. Under the Amendment, the least populous Senate district is permitted one Senator for 18,414 persons. In the most populous district, a senator represents 71,871 persons. The situation is perpetually frozen. The district favored is one decreasing in population and which has been so steadily for many years. The district abused has gained continually in population, and must continue to do so, so that the distortion over a short period of time must become even more shocking and over a long period wholly unconscionable.

6.22. Under the Amendment, 460,620 persons elect 19 members of the Senate. 1,203,328 persons elect only 20 members of the Senate. Effectively, one-third (1/3) of the population controls the senate and controls legislation in Colorado. It was carefully designed, and candidly stated in the testimony, that this be the case, and be perpetual.

6.23. Historically, the mountain and rural population of Colorado has tended continually to decline. The urban population of the Denver area and a strip of territory ex-

tending along the base of the Mountains, from Denver to Colorado Springs, has constantly increased, an is one of the most rapidly growing population areas in the United States. The admitted intention of the amendment was to prevent representation of the majority of the population as a majority in the State Legislature. It was proposed, and is urged that it is necessary, forever to prevent majority control of the legislature.

6.24. The proponents of the Amendment, and the Appellees generally, have admitted that the Amendment does not constitute or attempt to provide for apportionment in accordance with the principle of equality of representation as of right, for they argue and maintain that there is no such right to representational equality. They admit that the Amendment was purposed, intended, and contrived to negative representation on a population basis, and to vest a controlling function perpetually in a clear minority of the population, described by the majority of the trial Court as representing "insular" interests, which are thus given, and intended to be given, perpetual legislative control of the State of Colorado.

7. The majority of the Trial Court has candidly upheld these contentions, and has specifically held that the "special interests" of the minority geographical groups are such as to justify a legislative distortion and its perpetuation. The majority has stated that representation only in accordance with population would accord these special interest groups insufficient legislative voice, and, effectively, that because in some manner this program has garnered votes sufficient to enact the Amendment the majority voting at the November, 1962, election may deprive all Colorado citizens of their rights under the Constitution

of the United States. The Appellants specifically contend that no vote of the population of any State, no matter by what majority, may abrogate the provisions of the Constitution of the United States, and may not permit the deprivation of any part of the citizenry of the State of the federally protected right to equal protection of the laws. The modification of the Colorado Constitution was attemped only because the Courts had indicated the gross impropriety of evasion of the old provisions of the Constitution, requiring reapportionment on fundamental population bases. Nothing but inherent economic selfishness, is forwarded as a reason for the amendment, and its perpetual freezing of Senatorial control in a minority of the voters of the State. It is submitted that representation under the Constitution is and can be nothing but representation of *people*, not of "interests", whatever those may be nor however overweaning some may esteem them, and it is submitted that the allowing of validation of statutes, declared to be repugnant to the Constitution of the United States, by a voting majority in any state is fundamentally indefensible and a complete subversion of basic constitutional right. The limitations of a Constitution are in their essence protections of the individual against the many and of the citizen against the State. The limitations are limitations upon power, and specifically the power of the majority, to trespass beyond the bounds permitted. It is submitted that the opinion of the majority is simply an abdication of the principle of individual equal protection of the laws; that the right of any single individual to that protection transcends the economic "interests" of any group or area.

8. The Dissenting Opinion points out that the per curiam Memorandum Opinion, Appendix A, had already

held that the Plaintiffs had established their prima facie case of unconstitutionality against the protested measures and systems. It further observes that no logical basis exists to distinguish between Senate and House of Representatives, and that the equal protection clause applies to both, there being no analogy to the Congress of the United States, as discussed by this Court in *Gray vs. Sanders*, 83 S.Ct. 801.

8.1. That dissent particularly urges the principle of *Simcock vs. Duffy*, 215 F. Supp. 169, that "an apportionment should not be permitted that would allow a blockage of major legislation desired by the great majority of electors of Delaware to come to pass in the Senate. Effecting the will of the majority of the people of a State must be deemed to be the foundation of any apportionment plan." It is further urged, as concerns the validity of Amendment 7, that " the unpleasant truth is that it was particularly designed and dictated not by factual differences, but rather by political expediency. Simplicity and success at the polls overrode the considerations of fairness and justice. Thus, Amendment No. 7 fails the test of rationality in its adoption."

9. Basically, it is urged that there are no historic evidences supporting the theory written into Amendment 7, insofar as concerns Colorado. The majority opinion's assertion that freezing of this distorted situation is unimportant, since the Constitution may again be amended one day, is most unrealistic, and the remedy is meaningless to the individual whose individual right under the Fourteenth Amendment, paramount in our Constitutional scheme of things, is thus rendered useless.

10. The endeavor of the Majority Opinion is openly to fortify and assist certain "insular" economic interests, by holding that they must be allowed 2½ to 1 majorities over interests of the majority of the people, resident in the urban areas, adequately to protect the "insular interest" against the majority. The Constitution contemplates no representation of mines nor the mountains which house them, nor plains and cattle nor the rivers which water them. It contemplates only the representation of people, each one equally whether he be miner, farmer, grazier, or urban resident, and none more than equally.

11. Appellants most respectfully submit that the present case presents the most clear and straight-forward situation yet judicially presented of wilful attempt of special interest to retain legislative entrenchment. For more than one hundred years, after a great war and a constitutional revolution following it, it has been clear that no State, no group of persons within a State, even the majority thereof, may cast off the protections given by the United States to each of its citizens. The matter sanctioned in this case in the form of Amendment 7 has no more dignity, status, or meaning than had the infamous acts of Nullification or Secession. *Baker vs. Carr*, it is submitted, should be viewed as a basic charter of freedom of the elector. The entire tendency of suffrage in the free world has been to the accomplishment of a fundamental voting equality between human units. Artificialities of the kind here upheld, we submit, are untenable, and its is submitted that jurisdiction properly vests in this Honorable Court in this case where, there being so few factual questions, the legal question is in its purest form clearly presented.

SUBSTANTIALITY OF GROUNDS

This appeal is a direct appeal from a three-judge Court convoked upon the basis of involvement of constitutionality of State statutes and State constitutional provisions, and directly within the provisions of Section 1253 above quoted and referred. The action involves a direct challenge to the apportionment statutes of Colorado, which have been held in the initial Memorandum Opinion (Appendix A) to be unconstitutional. It involves, as well, the constitutional validity under the Fourteenth Amendment of an Amendment to the Constitution of Colorado, which amendment was adopted and forwarded largely with the object of preventing application of the rule of representation of population in the Senate of Colorado. The problem, in its essence, is the problem first brought into focus by this Court in *Baker vs. Carr,* and now before this Honorable Court, and before the Courts of ultimate State jurisdiction and subsidiary Federal Courts in so many of the States.

It is to be noted that the effect of the Colorado Amendment is to freeze the Senate upon the basis of now existing districts. Those districts purport to have been established only a population basis, but have become in time so distorted as to create an invidious discrimination. The Trial Court before amendment so found and so held. The Amendment incorporates the unconstitutional statute, and does not permit of change of the districts established by it. It does provide that the few multi-member districts are, internally, to be broken into single member constitutencies, reapportioned from time to time on a population basis. The single-member districts, however, are established to protect interests in the relatively unpopulated

areas, so that distortion must become necessarily worse as time progresses.

This Court has remarked in *Gray vs. Sanders*, 83 S. Ct. 801 (March 18, 1963), in discussion the Georgia County Unit System, that under the Act there considered "the vote of each citizen counts for less and less as the population of the county of his residence increases." This, of course, is precisely true of the altered Colorado Senate, where, as the control is vested in dwindling counties, the vote of each of these cattle raisers, or agriculturists, or miners, mentioned as such because the Trial Court assumes protection of their economic interests as such to be a justification of the distortion, becomes ever greater as population decreases, while the dwellers in metropolitan and urban areas have ever less individual voice as the population in those areas waxes greater.

There is no historical basis for this kind of situation in Colorado, since our constitution has always based legislative representation on population, and had no other standard. Our counties are not long-founded historical units, but have been often altered, and are held to be simply administrative arms of the State, modifiable at its will. The Colorado Supreme Court held in *Dixon vs. People*, 53 Colo. 527, 127 Pac. 930, that a county is an involuntary political and civil division of the territory of the state, created to aid in administration of governmental affairs, a quasi corporation for orderly government within the scope of its authority, and nothing more than a governmental agency or political subdivision, exercising locally some functions of state government; as repeated in *Colorado Investment And Realty Co. vs. River-*

view Drainage Dist., 83 Colo. 468, 266 Pac. 501, and *Gamewell vs. Strumpler*, 84 Colo. 459, 271 Pac. 180.

There is no argument available as to parallelism between the State legislatures and the Congress, or the electoral college, for no such historical bases of parallelism exists. The United States was a union of sovereign states, but the State of Colorado was not, certainly, a union of Counties. *Gray vs. Sanders, supra,* at page 807, rather elaborately discussed the invalidity of such assumed historial parallel.

It is submitted that the argument of control by tiny minorities of citizens, with special economic interests, of the destinies of a state, simply because they are few in number, is quite irrational, and violative of the basic requirements of equal protection, as stated by this Court in *Gray vs. Sanders*, at page 808:

"How, then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal voice — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State when he casts his ballot in favor of one

of several competing candidates, underlies many of our decisions."

This Court has further stated that "the conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — One Person, One Vote."

It is most respectfully submitted, then, that if, as stated, there is no Constitutional indication that homesite affords a permissible basis for distinguishing between voters; if equality of voting power is required; if the ruling conception is One Person, One Vote; if representation is a representation of people in a State legislature, then, since the whole trend of voting history has been to expand and equalize the franchise and representation, a regressive, and an irrational measure, such as Amendment 7, openly advocated as an antidote to the doctrines of equality of franchise most recently coming from this Court, should not be permitted to stand. That Amendment does not expand and equalize representation. It contracts and freezes disparity, making it ever greater as the numbers of urban and suburban dwellers increase. As the unit in which a person lives becomes more economically and demographically important, the voice of the voter and of the area decreases, so that the system is entirely regressive and calculated and stated to preserve control in a group of counties of ever-dwindling importance. Representation in this nation is not of *interests*. It is of *people*. If that principle clashes with the needs of economic interests, it is submitted that the economic interest must yield.

In Colorado, under the proposed arrangement, 18,414

persons in Park, Clear Creek, Gilpin, and Chaffee counties, unpopulated areas of mountains, having as their primary function some mines, equal 71,871 persons in Pueblo, an industrial steel city. They will always do so, moreover, except that Pueblo has an expanding population, and the mountain counties decrease continually in population. This we submit is offensive.

Mann vs. Davis, supra, is now pending before this Court. Very similar problems to those in Colorado are presented by that case.

There the Court specifically considers that meaning of apportionment as intimately tied to population, and remarks that "in this consideration there is no difference in status between the Senators and Delegates in their disposition throughout the State. The Senate and the House each have a direct, indeed the same, relation to people. No analogy of the State Senate with the federal Senate in the present study is sound. The latter is a body representative of the states qua states, but the state Senate is not its regional counterpart. State senatorial districts do not have state autonomy. The bicameral system is a creature of history and many of the reasons for its creation no longer obtain. The chief justification for bicameralism in state government now seems to be the thought that it insures against precipitate action — imposing greater deliberation — upon proposed legislation."

It is submitted, then, that since *population* is the essential predicate for representation in a state legislature, a device which uses the check of the Senate to thwart legislation, by keeping that Senate under control of a minority, ever decreasing, of the population is invalid.

Much the same problems existed in litigation in *Scholle vs: Hare*, 116 N.W.2d 350, 367 Mich. 176, voiding a system much parallel to the recently attempted Colorado one. The Court remarks, in voiding the Michigan situation, that "*our present senate, of course, does not follow any plan. It is simply an arbitrary freezing in of the various districts.*"

Precisely the same thing is true of the Colorado Senate under Amendment 7.

It is submitted that the issues presented by the apportionment decisions, cognate to the issues presented in the integration matters, are the paramount constitutional issues currently before our Courts.

No question exists that there is jurisdiction in the federal courts to resolve the problem. The three-judge court is in entire agreement that such is the case. That Court is, however, divided, two to one, in its substantive opinion. There are few if any factual questions before the Court. There is a very fundamental lagal question, most squarely presented by the Colorado Amendment. That question is simply whether it is possible in the way done in Colorado to separate the Senate perpetually from population considerations and thus to vest effective legislative control in an ever-decreasing minority of the population.

Only the Supreme Court of the United States may ultimately resolve that question. It is of pressing importance, inasmuch as it is quite problematical even in what manner the next elections to the Colorado legislature are to take place until that matter be resolved. The record demonstrates the anxiety of the three-judge Court expe-

ditiously to resolve that matter, in direct expectation that the matter would come before the Supreme Court in the current term.

It is, then, respectfully submitted that the issues are substantial; that this Court has taken cognizance of the like issues related to other states, and now pending before this Court as set forth above; and that jurisdiction should be taken of the instant appeal.

Most respectfully submitted,

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Attorneys for Appellants

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7501

ARCHIE L. LISCO, AND ALL OTHER REGISTERED VOTERS OF THE DENVER METROPOLITAN AREA, STATE OF COLORADO, SIMILARLY SITUATED,

Petitioners,

v.

STEPHEN L. R. McNICHOLS AS GOVERNOR OF THE STATE OF COLORADO, TIM ARMSTRONG AS TREASURER OF THE STATE OF COLORADO, GEORGE BAKER AS SECRETARY OF THE STATE OF COLORADO, THE STATE OF COLORADO AND THE GENERAL ASSEMBLY THEREOF,

Respondents.

Civil Action No. 7637

WILLIAM E. MYRICK, JOHN CHRISTENSEN, ED SCOTT, GORDON TAYLOR, HENRY ALLARD, ANDRES LUCAS, JOHN L. KANE, WILLIAM J. WELLS, FRANK A. CARLSON, WILLIAM EPPINGER, ALLEN L. WILLIAMS, RUTH S. STOCKTON, KENNETH FENWICK, CHESTER HOSKINSON, and JOE B. LEWIS, individually and as citizens of the State of Colorado, residents in the Counties of Adams, Arapahoe, and Jefferson, and taxpayers and voters in the State of Colorado, for themselves and for all other persons similarly situate,

Plaintiffs and Petitioners,

v.

THE FORTY-THIRD GENERAL ASSEMBLY OF THE STATE OF COLORADO; HON. STEPHEN L. R. McNICHOLS, AS GOVERNOR OF THE STATE OF COLORADO; HON. TIM ARMSTRONG, AS TREASURER OF THE STATE OF COLORADO, AND HON. GEORGE BAKER, AS SECRETARY OF STATE OF THE STATE OF COLORADO,

Respondents and Defendants.

FEDERAL PLAN FOR APPORTIONMENT, INC., a Colorado corporation not for profit, Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing, Wilber M. Alter, as incorporators and directors thereof and individually and as citizens, residents and taxpayers of the State of Colorado, and John Doe, individually and as a citizen of the State of Colorado, a resident and inhabitant of the City and County of Denver, and a taxpayer of the State of Colorado, on behalf of themselves and for all persons similarly situate,

Interveners.

Filed, United States District Court, Denver, Colorado, Aug. 10, 1962
G. Walter Bowman, Clerk.

Messrs. Salazar and Delaney, Attorneys at Law, 304 Denver-U.S. National Center, 1700 Broadway, Denver 2, Colorado, for Petitioners in Civil Action No. 7501; Honorable Duke W. Dunbar, Attorney General for the State of Colorado, Frank E. Hickey, Deputy Attorney General, and Richard W. Bangert, Assistant Attorney General, 104 State Capitol, Denver 2, Colorado, for Respondents in Civil Action No. 7501.

Charles Ginsberg, Esquire, George Louis Creamer, Esquire, 928 Equitable Building, Denver 2, Colorado, for Plaintiffs and Petitioners in Civil Action No. 7637; Honorable Duke W. Dunbar, Attorney General for the State of Colorado, Frank E. Hickey, Deputy Attorney General, and Richard W. Bangert, Assistant Attorney General, 104 State Capitol, Denver 2, Colorado, for Respondents and Defendents in Civil Action No. 7637.

Charles S. Vigil, Esquire and Richard S. Kitchen, Sr., Esquire, 2155 First National Bank Building, Denver 2, Colorado, for Interveners.

Philip J. Carosell, Esquire, 430 Majestic Building, Denver 2, Colorado, Amicus Curiae.

MEMORANDUM OPINION

Per Curiam.

The above cases were consolidated for trial and disposition. The actions in each instance are on behalf of the plaintiffs for themselves and others similarly situated as taxpayers and qualified voters of the State of Colorado.

In Civil Action No. 7501 it is alleged that the plaintiff

is a property owner and a registered voter who resides in Denver. He seeks to compel certain state officers to take specific affirmative action for the purpose of complying with the Fourteenth Amendment to the Constitution of the United States.

In Civil Action No. 7637 the plaintiffs allege that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States guarantees equality of franchise and the present legislative apportionment statutes[1] deprive them of the equality of franchise and vote which the Fourteenth Amendment guarantees, whereby these statutes are in conflict therewith; that the statute as applied to the 1960 federal census reveal gross inequalities and disparities in voting rights; that in some instances the disparities reach a proportion of eight-to-one.

Defendents, the Governor, State Treasurer, Secretary of State and General Assembly of the State of Colorado, have filed answers in which they challenge the jurisdiction of this Court, assert their own immunity from suit, and deny any unconstitutional discriminations.

Certain proponents of an initiated measure have, with the permission of the Court, intervened. From their complaint it appears that they are sponsoring an amendment to the Colorado Constitution which will appear on the ballot in the general election to be held in November, 1962. This measure according to the allegations of the petition and the evidence adduced at the hearing, would constitutionally establish the senatorial districts and would at the same time increase the membership of the Senate, giving additional senators to more populous districts and would

[1]Sections 63-1-2, 63-1-3 and 63-1-6, C.R.S. 1953.

authorize the districting of the House upon a population basis in the year 1963 and after each federal census thereafter. From the petition it also appears that another amendment[2] will appear on the November ballot. This would provide for the districting of both houses by a commission on a population basis, subject to review by the Supreme Court of Colorado. The prayer of interveners is that the Court dismiss these actions, or continue the consolidation cause until after the November election, or declare invalid Section 47 of Article V of the Colorado Constitution which, according to interveners, forbids the subdivision (by the Legislature) of legislative districts[3].

The Colorado legislature, which is called the General Assembly, is bicameral in character. The Senate has 35 members, elected for four-year staggered terms from 25 senatorial districts which are created by statute[4]. The House of Representatives has 65 members who are elected for two-year terms from 35 districts which are created by statute[5].
C.R.S. 1953.

The apportionment provision in the Colorado Constitution[6] authorizes the Assembly to create districts and to fix ratios, but requires that this be done with reference to federal or state enumerations. It provides that after each census made as provided by the State, or under the authority of the United States, the General Assembly

[2]No. 8. The amendment sponsored by interveners is No. 7 on the ballot.

[3]Since these measures are on the November ballot and could not apply to the upcoming Assembly, and since both require implementation, they would not take effect until 1964.

[4]Colorado Constitution, Article V, section 3 and sections 63-1-3, 63-1-4, C.R.S. 1953.

[5]Colorado Constitution, Article V, section 3 and section 63-1-6,

[6]Article V, section 45.

"shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration according to ratios to be fixed by law."

In an original proceeding in the Supreme Court of Colorado, No. 20240. *In the Matter of Legislative Reapportionment*, that court, in a decision filed July 6, 1962, construed the provision of the Constitution of Colorado in respect to the mandate to the Legislature to reapportion following the United States census to not require that apportionment take place in the session immediately following the census. The holding was that the "session next following an enumeration made by the authority of the United States" does not require reapportionment at the session *immediately* following the census report and as applied to the case before the Court held that "such legislation is not mandatory until the Forty-fourth General Assembly convenes."[7]

The federal constitutional question here presented was not considered, but the Court noticed the fact that the mentioned initiative measures will appear on the ballot in November and in recognition of this and of the possible defeat of both measures[8], the court retained jurisdiction until June 1, 1963, granting leave to reopen at that time if no constitutional amendment or legislative apportionment has meanwhile been adopted.

The record discloses that since Colorado first achieved statehood there has been a modicum of apportionment, either real or purported, and also that there have been

[7] That is, until January, 1963.

[8] In which case the Forty-fourth General Assembly would have to act on the issue. Both of these constitutional amendments would require legislative implementation.

several abortive attempts. Since 1876 the General Assembly has been reapportioned, or redistricted, five times: in 1881, 1901, 1913, 1932 and 1953. The 1953 statutes[9] are now in effect. Measures were introduced in the last General Assembly[10] to reapportion with reference to the 1960 federal census report. These measures failed to pass. One initiated reapportionment act has been passed during the period since 1876. This measure was adopted in 1932 but following its adoption the General Assembly passed its own legislative reapportionment act in 1933 which was designed to thwart the operation of the initiated act. This latter act was held by the Colorado Supreme Court to be unconstitutional[11].

Factual data presented at the trial reveals the existence of gross and glaring disparity in voting strength as between the several representative and senatorial districts. Colorado's present population, determined by the 1960 federal census, is 1,753,947. During the decade from 1950 to 1960 there was a percentage increase amounting to 32.4. During this period the urban areas increased 55.5 per cent, and there was a decrease in the rural areas amounting to 6.6 per cent. The population in 36 of the 63 counties decreased. Some specific examples of the disproportion are here mentioned: The most exaggerated example is in a district (having a single representative) which was shown to have a population of only 7,867 as compared with another representative district (having two representatives) for a population of 127,520 people. Similar disparity exists in the senatorial districts. A single senator represents a district of 127,520 people while another senator-

[9]Section 63-1-1, supra.
[10]The Forty-third.
[11]**Armstrong v. Mitten**, 95 Colo. 425, 37 P. 2d 757.

has 17,481 people in his district. A senator from one of the seven most populous districts represents on the average 90,309 constituents; a senator from one of the eighteen least populous districts represents on the average 29,013 persons. A representative from one of the seven most populous districts represents on the average 46,342 while a representative from one of the twenty-eight less populous districts represents an average of 15,993 persons. Also noteworthy is the fact that 29.8 per cent of the 1960 population is capable of electing a majority of the Senate, and 32.1 per cent of the population is capable of electing a majority in the House of Representatives. Stated differently, it can be said that 562,741 persons elect 33 representatives, a majority, whereas 1,190,306 persons elect 32 representatives, a minority of the House. Similarly, in the Senate 556,912 voters elect 19 of the 35 senators, whereas 1,207,035 elect the remaining 16 senators.

The inevitable effect of the present Apportionment Act[12] has been to develop severe disparities in voting strength with the growth and shift of population. It provides that the ratio for the apportionment of senators shall be one for each senatorial district for the first 19,000 of population and one ~~for~~ each additional 50,000 or fraction over 48,000. The ratio fixed for the House is one representative for the first 8,000 of population and an additional representative for each additional 25,000 or fraction over 22,400 of population. The inevitable consequence of these ratios is the kind of disparity which now exists.

Three questions need to be discussed at this time. They include: *First*, the issue of exercise of jurisdiction; *secondly*, the question whether the disparity in voting

[12]Section 63-1-2.

strength which is described above sufficiently establishes the unconstitutionality of the districting statutes as applied to these plaintiffs; and *thirdly*, the question whether upon the basis of the present showing—the circumstances before us—we are justified in now granting relief.

I.

THE JURISDICTION QUESTION

The plaintiffs seek "to redress the deprivation, under color of * * * State law * * * of * * * right, privilege of immunity secured by the Constitution of the United States * * *," and thus they bring themselves within the terms of Title 28 U.S.C. §1343(3). The action seeks an injunction against enforcement of state statutes upon the ground of their unconstitutionality pursuant to Title 28 U.S.C. §2281 and requires a three-judge court created pursuant to Section 2284. *Baker v. Carr*[13] holds that a claim such as the present one, based as it is upon alleged denial of a state statute creating disproportionate legislative rep of equal protection of the laws arising from the operation of a state statute creating disproportionate legislative representation, constitutes a justiciable issue; that the plaintiffs in such case assert a right cognizable by a federal district court. This decision eliminates any doubt as to jurisdiction of this Court to hear and determine the cause. The argument of the Attorney General that the Colorado Supreme Court has preempted jurisdiction by first hearing the controversy, is without merit in view of the fact that the Supreme Court of Colorado has refrained from even considering the issue of infringement of the plaintiffs' fed-

[13]369 U.S. 186, 82 S.Ct. Adv. Sheet 691, the decision of the Supreme Court which has given rise to these suits.

erally-guaranteed constitutional rights. The only question of a jurisdictional nature is whether under the circumstances here presented this Court should as a matter of policy abstain from the *exercise* of jurisdiction. *General Investment & Service Corporation v. Wichita Water Company*, 10 cir., 236 F. 2d 464, lays down the standards applicable to acceptance or abstinence. It is there said:

> " * * * The principle is well established and without dispute that under the rule of comity under our dual system of Government in cases involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need be cited to support this statement. It is recognized without exception. The Supreme Court has held that where there is pending in the federal court a case involving the construction of a state law and if one construction will remove the federal question a federal court should stay its hand, retain jurisdiction and relagate the parties to the state court to first seek a construction of the statute * * *"

See also *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341; 71 S. Ct. 762; *Corporation Commission of Oklahoma v. Cary*, 296 U.S. 452, 56 S. Ct. 300; *Burford v. Suh Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098; *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070.

The considerations which demand abstinence are not present in the instant case. Here, the General Assembly

of the State of Colorado has repeatedly refused to perform the mandate imposed by the Colorado Constitution to apportion the legislature. The likelihood that the unapportioned General Assembly will ever apportion itself now appears remote. The Supreme Court of Colorado, while retaining jurisdiction of the subject matter of the controversy presented to it, has postponed further consideration of the cause until June, 1963. Under these circumstances, we must conclude that the parties do not, at least at present, have an adequate, speedy and complete remedy apart from that asserted in the case at bar and thus grounds for abstention are at this time lacking.

Nor is there any merit in the contention of the Attorney General that the suit is against the State. The action is against state officers. It seeks injunctive relief against violation of the federal constitution, and thus sovereign immunity is not an issue. *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 72 S. Ct. 321; *Harrison v. St. Louis & Santa Fe R. Co.*, 232 U.S. 318, 34 S.Ct. 333.

II.

THE INEQUALITY IN VOTING STRENGTH AS SHOWING UNCONSTITUTIONALITY OF THE DISTRICTING STATUTES

Baker v. Carr does not pass directly on the validity of the apportionment reflected by the Tennessee Districting Statutes. It merely recognizes that allegations of debasement of franchise growing out of disproportionate voting rights tender issues of constitutionality cognizable by federal courts. No guidelines or criteria are laid down

for determining the extent or level of disproportion necessary to constitute infringement of the Equal Protection Clause of the Fourteenth Amendment. Thus, the body of case law construing the Equal Protection Clause applies.

It is, of course, axiomatic that absolute equality between classes is not essential to validity under the Equal Protection Clause, but a rational basis for the legislative distinctions is necessary.

The test usually employed for determining whether the discrimination is valid or invalid—rational or irrational—is whether the discrimination is "invidious."[14] In his concurring opinion,[15] Mr. Justice Douglas reiterates the "invidious" test as the proper one: (82 S.Ct. Adv. sheet, p. 724)

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.' See Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655. Universal equality is not the test; there is room for weighting. As we stated in Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563, 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'"

In *Moss v. Burkhart, et al.*, No. 9130 in the United States District Court for the Western District of Okla-

[14](Among the definitions given by Webster for this somewhat ambiguous term are, "of an unpleasant nature; hateful; obnoxious.")

[15]In **Baker v. Carr**, supra.

homa, the disparity in voting strength between citizens of one county as compared with citizens of another county exceeded in some instances ten-to-one. The court there found that both branches of the Legislature had consistently disregarded the State Constitution with respect to apportionment.

The Court went on to note that one vote for a representative in one country was equal to fourteen votes for the same offices in another county, and eleven votes in still another county. The Court said that the disparity existing in the senatorial districts was even greater. On the basis of this evidence it was concluded that the discrimination was gross and egregious, "and without rational basis or justification in law or fact." The Court proceeded to hold that the apportionment act as it then existed in Oklahoma was "invidiously discriminatory" as against the plaintiff in the action and class of voters which he represented.[16]

The Supreme Court of Michigan, in *Scholle v. Hare*, 31 Law Week 2059, found invidious discrimination in a less aggravated fact setting. It was there said:

> " * * * that any law of our State giving some citizens more than twice the votes of other citizens in either the primary or general election would lack constitutional equality so as to void that law. * * * When a legislative apportionment provides districts having more than double the population of others, the constitutional range of discretion is violated. This is not to say that less than such 2 to 1 ratio is con-

[16]Final judgment has been postponed until April, 1963 to give the Oklahoma legislature a further opportunity to reapportion.

stitutionally good. It is to say only that peril ends and disaster occurs when that line is crossed.'"[17]

At the hearing the plaintiffs offered exhibits showing the population of the state, the counties, and the senatorial and representative districts and rested their case on the proposition that such exhibits show such a disparity in representation as to establish invidious discrimination and to destroy any claim of rationality in the apportionment of the legilature. The defendants assert that the legislative districts are justified by topographic, geographic, historical and economic factors which have been applied in a rational manner but they presented no evidence to sustain their position. The interveners called two witnesses, each of whom recognized a malapportionment of the House, and with general statements defended the apportionment of the Senate. Their testimony with regard to the Senate is weakened by their own initiated proposal which makes changes in the apportionment of that body. In effect, we are left with a situation where one side says that the population figures show invidious discrimination and the other side says that the disparities so shown are not sufficient to overthrow the presumption of constitutionality.

We recognize that a statute is presumed constitutional, and that he who attacks the constitutionality of a statute bears a heavy burden.[18] The population statistics presented by plaintiffs and challenged by no one, show

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[17] Although the Michigan Court held the Senate districting system unconstitutional, the Supreme Court stayed execution on the order enjoining the primary election.

[18] **Fletcher v. Peck**, 6 Cranch (10 U.S.) 87, 3 L. Ed. 162; **Dartmouth College v. Woodward**, 4 Wheat. (17 U.S.) 518, 4 L. Ed. 629; **Powell v. Pennsylvania**, 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253; **Nicol v. Ames**, 173 U.S. 509, 19 S. Ct. 522, 43 L. Ed. 786; **Fleming v. Nestor**, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435.

the disparities we have heretofore noted. They are of sufficient magnitude to make out a *prima facie* case of invidious discrimination which rebuts the presumption. Accordingly, the defendants were obliged to show that there exists some rational basis for these disparities.

To sustain the rationality of the present districting of the Colorado General Assembly we are left with those facts which may be judicially noticed. We know that Colorado is a large state having two counties with and area of over 4,000 square miles and a number of counties of more than 2,000 square miles in size. We know that the east half of the state is a land of plains and the west half a land of mountains. The population is now concentrated in the metropolitan centers of Denver, Pueblo and Colorado Springs, all located in a narrow strip east of the Continental Divide. The economic interests of the farmers and miners, the stock raisers and the oil producers, the merchants and the consumers, the employers and the employees, industry and recreation, the mountains and the plains, the large cities and the small towns, have many differences. The Colorado statutes reflect that traditionally the districting of the legislature has favored certain areas with a great emphasis on the mining counties which was changed, at least partially, by the 1932 initiated measure which increased the representation of the eastern farming counties. We know too, that in the last twenty years the population has become more and more concentrated in the metropolitan areas.

These matters of general knowledge may justify disparities in legislative districts. They do not, of themselves, sustain the rationality of the legislative districts as they

now exist. Reliance on generalities is misplaced when a case must be decided on the basis of specific situations.

We are asked to stay our hands until the State has acted through its machinery. The principle that there should be a minimum of judicial intrusion by federal courts into the governmental affairs of a state needs no amplification. We are aware that the integrity and independence of state govenrments must be preserved and that the states must have the widest possible latitude in the conduct of their internal affairs and in the solution of their own problems. Of comparable importance is the protection of the individual in the enjoyment of his constitutional rights and privileges. The sensitive balance which must be maintained between the protection of individual rights and the preservation of state integrity cautions against precipitate action.

III.

WHETHER A DECREE SHOULD BE ENTERED NOW

There are additional considerations which bear on whether a decree should be entered at this time adjudicating the constitutionality of the Colorado districting statutes and decreeing a scheme of apportionment in the event of a holding of unconstitutionality.

The record before us is, as shown above, inadequate. The trial of the case was completed in one day and the only testimony offered was that on behalf of the interveners. Although plaintiffs offered a number of exhibits showing the extent of voter strength disproportion, there was no evidence describing possible plans for remedying

invidious discrimination should the same be found. Considering the lack of substantial evidence of this character, it would be presumptuous for this Court to devise a plan on its own iniative.

Secondly, in view of the magnitude of the task, the time is wholly inadequate. The political parties have now held their assemblies at which candidates have been designated to appear on the ballot at the primary election which is scheduled to take place on September 11, 1962. Any positive orders which we might enter at this time would likely interfere with this election and would have a disruptive effect. The time available is so insufficient as to render it impractical, if not impossible, to now deal with the merits of the case.

In the light of the foregoing, we conclude that final adjudictation should be postponed until a further hearing has been held on all issues.

We further conclude that the case presented is not one for temporary injunctive relief and that there should be no impediment to the orderly conduct of the election or interference with the electorate in the free expression of their opinions on the initiated measures at the coming election; accordingly, it is

ORDERED that the cause be continued until on or about November 15, 1962. On or about that date a pretrial hearing shall be held, and soon thereafter a further trial on the merits. It is

FURTHER ORDERED that all motions for temporary injunctions be denied.

Notices of the exact date and hour of further hearings will be furnished at a later date.

DATED at Denver, Colorado, this tenth day of August, A.D. 1962.

BY THE COURT:

JEAN S. BREITENSTEIN, Judge
United States Court of Appeals

ALFRED A. ARRAJ, Chief Judge
United States District Court

WILLIAM E. DOYLE, Judge
United States District Court.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7501

ARCHIE L. LISCO, and all other registered voters of the Denver Metropolitan Area, State of Colorado, similarly situated,

Plaintiffs,

v.

JOHN LOVE, as Governor of the State of Colorado, HOMER BEDFORD, as Treasurer of the State of Colorado, Byron Anderson, as Secretary of the State of Colorado, THE STATE OF COLORADO and THE FORTY-FOURTH GENERAL ASSEMBLY THEREOF,

Defendants.

Civil Action No. 7637

WILLIAM E. MYRICK, JOHN CHRISTENSEN, ED SCOTT, GORDON TAYLOR, HENRY ALLARD, ANDRES LUCAS, JOHN L. KANE, WILLIAM J. WELLS, FRANK A. CARLSON, WILLIAM EPPINGER, ALLEN L. WILLIAMS, RUTH S. STOCKTON, KENNETH FENWICK, CHESTER HOSKINSON, and JOE B. LEWIS, individually and as citizens of the State of Colorado, residents in the Counties of Adams, Arapahoe, and Jefferson, and taxpayers and voters in the State of Colorado, for themselves and for all other persons similarly situated,

Plaintiffs,

v.

THE FORTY-FOURTH GENERAL ASSEMBLY of the State of Colorado, JOHN LOVE, as Governor of the State of Colorado, HOMER BEDFORD, as Treasurer of the State of Colorado, and BYRON ANDERSON, as Secretary of State of the State of Colorado,

Defendants.

Civil Actions No. 7501 and No. 7637

EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING, and WILBUR M. ALTER, individually and as citizens, residents and taxpayers of the State of Colorado, on behalf of themselves and for all persons similarly situated,

Intervenors.

Filed United States District Court, Denver, Colorado July 16, 1963
G. Walter Bowman, Clerk

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MEMORANDUM OPINION AND ORDER

Before BREITENSTEIN, Circuit Judge, and ARRAJ and DOYLE, District Judges.

BREINTENSTEIN, Circuit Judge.

These consolidated actions attack the apportionment of the membership of the bicameral Colorado legislature. At the 1962 General Election, two initiated constitutional amendments were submitted to the electorate. One, known as Amendment No. 7, provided for a House of Representatives with the membership apportioned on a per capita basis and for a Senate which was not so apportioned. The other, Amendment No. 8, apportioned both chambers on a per capita basis. Amendment No. 7 carried in every county of the state and Amendment No. 8 lost in every county.[1] The contest over the conflicting theories presented by these two proposals has now shifted from the political arena to the court. The issue is whether the Federal Constitution requires that each house of a bicameral state legislature be apportioned on a per capita basis.

The plaintiffs are residents, taxpayers, and qualified voters within the Denver Metropolitan Area. The defendants are various state officials[2] and the Colorado General Assembly. The complaints as originally filed on March 28 and July 9, 1962, respectively, challenged the apportionment of legislative membership under the then existing constitutional and statutory provisions. Because the suits presented substantial questions as to the constitutionality of state statutes and sought injunctive relief, a three-judge court was convened under 28 U.S.C. § 2281. The proponents of Amendment No. 7, which had then been submitted to the Colorado Secretary of State for

[1]See footnote 32, infra.

[2]Since the suits were filed, the incumbents of these offices have changed. An appropriate order of substitution has heretofore been made under Rule 25(d), F.R.Civ.P.

inclusion on the ballot at the 1962 General Election, were permitted to intervene.[3]

On August 10, 1962, after trial, the court held[4] that it had jurisdiction, that the plaintiffs had capacity to sue, that the evidence established disparities in apportionment "of sufficient magnitude to make out a *prima facie* case of invidious discrimination," and that the defendants had shown no rational basis for the disparities. The court noted that the aforementioned initiated constitutional amendments would be on the ballot at the ensuing General Election, declined to enjoin the forthcoming primary election and to devise a plan of apportionment, and continued the cases until after the General Election.

Following the approval by the electorate of Amendment No. 7, the plaintiffs amend their complaints to assert that Amendment No. 7 violates the Fourteenth Amendment to the United States Constitution by apportioning the Senate on a basis other than population and that, as the provisions of Amendment No. 7 are not severable, the entire amendment is invalid. In answering the amended complaints, the defendants renewed their jurisdictional objections and asserted the constitutionality of Amendment No. 7.

We are convinced that the allegations of the complaints are sufficient to establish federal jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, and that the

[3]Four of the intervenors are residents, taxpayers, and qualified voters of the counties within the Denver Metropolitan Area and the other of Moffat County. One intervenor was a nonprofit corporation and it has been heretofore dismissed from the case on the ground of a lack of capacity to sue.

[4]See Lisco v. McNichols, D.C.Colo., 208 F. Supp. 471, 478.

plaintiffs have standing to sue.[5] The relief sought is a declaration that Amendment No. 7 is void, that the theretofore existing statutory apportionment is void, and that the court fashion appropriate injunctive relief to assure equality in voting rights. Although the prime attack is now against a provision of the state constitution rather than a state statute, the necessity of adjudication by a three-judge district court is still present.[6]

The Colorado legislature met in January, 1963, and passed a statute, H. B. No. 65, implementing Amendment No. 7. No question is raised concerning the implementing legislation.

Amendment No. 7[7] created a General Assembly composed of a Senate of 39 members and a House of Representatives of 65 members. The state is divided into 65 representative districts "which shall be as nearly equal in population as may be" with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which "shall be as nearly equal in population as may be." Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census.

The defeated Amendment No. 8[8] proposed a thre-

[5] Baker v. Carr, 369 U.S. 186, 204-208.

[6] See American Federation of Labor v. Watson, Attorney General, 327 U.S. 582, 592-593, and Sincock v. Duffy, D.C.Del., 215 F. Supp. 169, 171-172.

[7] See Appendix A following this opinion.

[8] See Appendix B following this opinion.

man commission to apportion the legislature periodically. The commission was to have the duty of delineating, revising and adjusting senatorial and representative districts. Its actions were to be reviewed by the Colorado Supreme Court. The districting was to be on a strict population ratio for both the Senate and the House with limited permissible variations therefrom.

The record presents no dispute over the material and pertinent facts. The parties disagree as to the conclusions to be drawn from these facts. The plaintiffs rely entirely on statistics said to show that population disparities among the senatorial districts result in over-representation of rural areas. The defendants and intervenors assert that the senatorial districts, and the apportionment of senators thereto, have a rational basis and violate no provisions of the Federal Constitution.

The prime position of the plaintiffs is that representation in proportion to population is the fundamental standard commanded by the Federal Constitution. They say that this standard requires that each house must be made up of members representing substantially the same number of people.

The principle of equal weight for each vote is satisfied by a system under which all members of the legislature are elected at large. Such system would result in absolute majority rule and would effectively deny representation to minority interests. Although it would assure no dilution of weight of any individual's vote, it presents the danger of dilution of the representitive and deliberative quality of a legislature, because of the practical diffi-

culties of intelligent choice by the voters and because of the hazard of one-party domination.

The disadvantages of elections at large are overcome by the principle of districting. This principle provides representation to interests which otherwise would be submerged by the majorities in larger groups of voters.

From the very beginning of our Nation, districting has been used at all levels of government—national, state and local.[9] The application of the districting principle to a state legislature requires the division of the state into geographical areas and the apportionment of a certain number of members of the legislature to each district. The plaintiffs say that the district boundaries must be so drawn, and the apportionment to each so made, that the result is substantial equality in the number of people represented by each member of each chamber of the legislature. The query is whether this is required by the Federal Constitution.

Baker v. Carr sets up no standards for the apportionment of a state legislature. That decision rejects the Guaranty Clause[10] as a basis for judicial action in such cases and speaks in terms of Equal Protection Clause of the Fourteenth Amendment with overtones of the Due Process Clause. The application of these principles causes us difficulty. If we are concerned with equal protection, the question arises as to what laws we consider when

[9]As said by Neal in his article, "Baker v. Carr: Politics in Search of Law," published in the 1962 Supreme Court Review, 252, 277; "* * * the principle of districting within each such unit reflects our conviction that the general interest, and the innumerable separate interests of which it is composed, will be better expressed in a medley of voices from minor fractions of the population than by any monolithic majority."

[10]U.S. Const. Art. IV, § 4.

evaluating the equality of protection. In Baker v. Carr a non compliance with state constitutional provisions was present. We have no need to consider whether deliberate departure from state law denies equal protection[11] because here we are dealing with the state constitution itself and the attacked provisions fall only if they impinge on the Federal Constitution.

We are not concerned here with racial discriminations forbidden by the Fourteenth and Fifteenth Amendments or with discrimination on the ground of sex in violation of the Nineteenth Amendment. If we reject the republican form of government standard as a basis for judicial action, we are left with the Due Process Clause to support an assertion of denial of equal protection upon the theory that unequal representation denies equal protection because minority process is not due process.[12]

For all practical purposes the Supreme Court has foregone the application of the Due Process Clause in substantive matters unless an impingement on some absolute civil right occurs.[13] Although the right of franchise is "a fundamental political right, because preservative of all rights,"[14] no provision of the Federal Constitution of which we are aware makes it an absolute right or forbids apportionment of a state legislature on a basis other than one-man, one-vote. Baker v. Carr speaks in terms of "rationality" and "invidious discrimination." The use

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[11]See Snowden v. Hughes, 321 U.S. 1, 11.

[12]Dixon, "Legislative Apportionment and the Federal Constitution," Law and Contemporary Problems, Vol. XXVII, No. 3, 329, 383.

[13]See Ferguson, Attorney General of Kansas, v. Skrupa, 372 U.S. 726, 731, Wherein the Court refers to the abandonment of the Due process Clause "to nullify laws which a majority of the Court believed to be economically unwise."

[14]Yick Wo v. Hopkins, Sheriff, 118 U.S. 356, 370.

of these terms precludes the existence of an absolute right.

If either the Equal Protection Clause or the Due Process Clause or both require absolute majority action, some drastic governmental changes will be necessary. "Every device that limits the power of a majority is, in effect, a means of giving disproportionate representation to the minority."[15] The problem is compounded in the situation with which we are concerned. With full operation of the one-man, one-vote principle, the Colorado electorate by an overwhelming majority approved a constitutional amendment creating a Senate, the membership of which is not apportioned on a strict population basis. By majority process the voters have said that minority process in the Senate is what they want. A rejection of their choice is a denial of the will of the majority. If the majority becomes dissatisfied with that which it has created, it can make a change at an election in which each vote counts the same as every other vote.

A test for determination of equal protection in apportionment cases might logically be better based on the concept of a republican form of government than on the uncertainties, vagueness, and subjective implications of due process. Whichever route is taken the journey ends at the same destination, the necessity of deciding whether the Federal Constitution requires equality of population

[15]Quoted from Neal, supra, p. 281. Neal says further: "A constitutional principle that puts unequal districting in doubt also calls into question, by necessary implication, provisions requiring special majorities for particular kinds of legislation, such as approval of bond issues in municipal referenda or adoption of proposed constitutional amendments by legislatures or passages of legislation over an executive veto. Why should it not reach, as well, other procedural rules or devices that give obstructive power to minorities, such as the filibuster or the seniority system for choosing committee chairmen?"

within representation districts for each house of a bicameral state legislature. We believe that the question must be answered in the negative.

The concept of equality of representation is without historical support.[16] Supreme Court precedents indicate that it is not required.[17] Four, and perhaps five, of the Justices sitting in Baker v. Carr reject the idea.[18] A heavy majority of the state and lower federal courts has declined to accept the "'practical equality standard'' as a require-

[16]See the historical material in the dissent of Justice Frankfurter in Baker v. Carr, 369 U.S. 186, at 301-324, and the opinion of Judge Edwards in Scholle v. Hare, 360 Mich. 1, at 85, 104 N.W. 2nd 63, at 107, vacated and remanded 369 U.S. 429, on remand 367 Mich. 176, 116 N.W. 2nd 350, petition for certiorari filed October 15, 1962, 31 Law Week 3147.

[17]E.g. MacDougall v. Green, Governor of Illinois, 335 U.S. 281, where the Court said: "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government." (p. 283) In Norvell v. State of Illinois, ——— U.S. ———, decided May 27, 1963, a case relating to the right of an indigent to a trial transcript at state expense, the Court, after quoting from Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69-70, a statement that the problems of government are practical ones which may justify if not require rough accomodations, said: "The 'rough accommodations' made by government do not violate the Equal Protection Clause of the Fourteenth Amendment unless the lines drawn are 'hostile or invidious.'"

[18]See concurring opinion of Justice Clark (369 U.S. 186) at p. 252, concurring opinion of Justice Stewart at pp. 265-266, and separate dissenting opinions of Justices Frankfurter and Harlan. Justice Douglas said in his concurring opinion at pp. 244-245: "Universal equality is not the test; there is room for weighting."

ment inherent in the Equal Protection Clause.[19] By the admission of states into the Union with constitutions creating bicameral legislatures, membership to which is not apportioned on a population basis, Congress has rejected the principle of equal representation as a constitutional requirement.[20] The decision in Gray v. Sanders, 372 U.S. 368, is not contrary because there the Court was not concerned with any limitation on "the authority of a State Legislature in designing the geographical districts from which representatives are chosen * * * for the State

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[19]Sobel v. Adams, S.D. Fla., 208 F. Supp. 316, 321, 323, 214 F. Supp. 811; Thigpen v. Meyers, W.D.Wash., 211 F. Supp. 826, 831; Sims v. Frink, M.D.Ala., 205 F. Supp. 245, 208 F.Supp. 431, 439, probable jurisdiction noted June 10, 1963, ———U.S.———; W.M.C.A., Inc., v. Simon, S.D.N.Y., 208 F. Supp. 368, 379, probable jurisdiction noted June 10, 1963, ———U.S.———; Baker v. Carr, M.D.Tenn., 206 F. Supp. 341, 345; Mann v. Davis, E.D.Va., 213 F. Supp. 577, 584, Probable jurisdiction noted June 10, 1963, ———U.S.———; Toombs v. Fortson, N.D.Ga., 205 F. Supp. 248, 257; Davis v. Synhorst, S.D.Iowa, ———F.Supp. ———, 31 Law Week 2587; Nolan v. Rhodes, S.D.Ohio, ———F. Supp. ———, 31 Law Week 2641; Lund v. Mathas, 145 So. 2nd 871, 873 (Fla.); Caesar v. Williams, 371 P. 2nd 241, 247-249 (Idaho); Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 180 A. 2d 656, 667-669, 229 Md. 317, 182 A. 2nd 877, 229 Md. 406, 184 A. 2d 715, 718, probable jurisdiction noted June 10, 1963, ———U.S.———; Levitt v. Maynard, 182 A. 2n 897 (N.H.); Jackman v. Bodine, 78 N.J.Super. 414, 188 A. 2d 842, 651; Sweeney v. Notte, 183 A. 2d 296, 301-302 (R.I.); and Mikell v. Rousseau, 183 A.2d 817 (Vt.).

See Israel, "The Future of Baker v. Carr," 61 Mich. L. Rev. 107, 117, which notes as exceptions to the majority rule only Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350, petition for certiorari filed, 31 Law Week 3147 (Oct. 15, 1962), and Moss v. Burkhart, W.D. Okla., 207 F. Supp. 885, appeal dismissed ———U.S.———, June 10, 1963. The inclusion of Moss v. Burkhart as anexception is of doubtful propriety because the court there was concerned with specific provisions of the Oklahoma constitution. Sincock v. Duffy, D.Del., 215 F.Supp. 169, presented a question of severability and the peculiar factual situation in Delaware. The majority of the court said that the House must be based strictly on population and the Senate "substantially on population." 215 F. Supp. at 195.

[20]The constitutions of Alaska and Hawaii do not require equality of representation in each chamber of the legislature. In admitting these states Congress found the constitution of each "to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence." See Act of July 7, 1958, 72 Stat. 339, and Act of March 18, 1959, 73 Stat. 4.

Legislature * * * ."[21] The references in Gray v. Sanders to one-person, one-vote are not pertinent because the Court was considering an electoral system whereby votes for officers elected from a state-wide constituency were weighted differently.

Our conclusion that nothing in the Constitution of the United States requires a state legislature to be apportioned on a strict population basis does not dispose of the problem. The issue remains as to the permissible deviation from a per capita basis. Speaking in terms long applicable to equal protection cases, the Court suggested in Baker v. Carr that an apportionment of membership in a state legislature must be "rational" and not "invidiously discriminatory." The issue is narrowed in the cases at bar because, under Amendment No. 7, the lower chamber of the Colorado legislature is apportioned on a population basis. The question is the effect of the failure to apportion the upper chamber on the same basis. A discussion of this matter necessitates a return to the facts.

The cases now before the court do not present the issues as they existed prior to the apportionment made by Amendment No. 7. As noted by our opinion in Lisco v. McNichols, 208 F. Supp. 471, 477, the then-existing disparities in each chamber were severe, the defendants presented no evidence to sustain the rationality of the apportionment, and witnesses for the intervenors, while defending the apportionment of the Senate, recognized the malapportionment of the House. The change by Amendment No. 7 was such as to require a trial de novo and we are concerned with the facts as finally presented.

[21] 372 U.S. 368, 376, and see concurring opinion of Justice Stewart at pp. 381-382.

In Colorado the problem of districting the state for the election of members of the legislature and of apportioning legislators to those districts requires consideration of the state's heterogeneous characteristics. The politically determined boundaries of Colorado created a state which is not an economically or geographically homogeneous unit. The topography of the state is probably the most significant contributor to the diversity.

Colorado has an area of 104,247 square miles which is almost equally divided between high plains in the east and rugged mountains in the west. It has an average altitude of 6800 feet above sea level and some 1500 peaks which rise to 10,000 feet or more. The Continental Divide crosses the state in a meandering line from north to south.

In the eastern half of the state are high plains crossed by two major river systems, the South Platte and the Arkansas. The western half is a mountainous area drained principally by the Rio Grande and by the Colorado River and its tributaries. Major mountain ranges lie east of the Continental Divide in some sections of the state and have foothill areas of varying breadth separating the high peaks from the high plains.

Geographically the state is divided into many regions with transportation difficulties of varying severity. The high plains are crossed from east to west by several railroads and main highways. The only north to south rail system and main highway system in this area lie just east of the foothills. The western part of the state is separated into many segments by mountain ranges and deep canyons. One main-line railroad crosses this section from east to west and none from north to south. Four

principal highways provide east to west transportation by crossing the ranges at passes having altitutes of 9,000 to 12,000 feet. The north to south highways are less adequate and follow indirect routes. The terrain of the western section is such that some communities only a few miles apart on the map are many miles apart by the shortest useable road. Commercial air transportation between other than the metropolitan centers is limited.

Colorado is further divided by the availability of water supply. The state is largely semi-arid with only isolated mountain areas having an annual precipitation of over 20 inches. That part of Colorado west of the Continental Divide has 37% of the total state land area and 69% of the state's surface water yield. The part east of the Continental Divide has 63% of the land area and 31% of the surface water supplies.[22] Conflicts over the use of water have troubled the state continuously since its admission to the Union. The growth of the metropolitan areas would have been impossible without the trans-mountain diversion of water from the Colorado River and its tributaries. The divisive nature of the problem and the need for a state-wide water policy resulted in the creation of the Colorado Water Conservation Board,[23] the members of which are chosen geographically by drainage basins. This recognition of the diverse interests of the competing areas has enabled Colorado to develop impressive irrigation and hydroelectric power projects.[24]

The 1960 Federal Census gave Colorado a population of 1,753,947 persons. The population is concentrated heavily along the eastern edge of the foothills from Fort

[22]Colorado Year Book, 1959-1961, p. 451.
[23]Colo. Rev. Stat. Ann., 1953, §§148-1-1 to 148-1-19.
[24]Colorado Year Book, supra, pp. 459-462.

Collins on the north to Pueblo on the south. In this relatively narrow strip are located three Standard Metropolitan Statistical Areas as defined by the Census Bureau.[25]

The metropolitan areas and their populations are: Denver (Adams, Arapahoe, Boulder, Denver and Jefferson Counties) - 929,383; Colorado Springs (El Paso County) - 143,742; Pueblo (Pueblo County) - 118,707.

Expert research economists testifying for the defendants divided the state into four regions, Western, Eastern, South Central and East Slope. The Western Region includes those counties west of the Continental Divide and those east of the Divide and entirely within the Front Range of mountains. The area is largely mountainous with wide fluctuations in elevation, precipitation and temperature. About two-thirds of the population live in communities of less than 2,500 inhabitants or on farms. Over 65% of the area is in some form of government ownership. The major industries are agriculture (principally livestock raising), mining, and tourism.

The Eastern Region is a part of the Great Plains. The area is dominated by agriculture with winter wheat the principal crop. Irrigation in the South Platte and Arkansas Valleys produces specialized crops. Livestock raising and feeding are imporatnt activities. There is some oil production.

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[25]So far as pertinent the Census Bureau defines a Standard Metropolitan Statistical Area as: "a county or group of contiguous counties which contains at least one city of 50,000 inhabitants or more or 'twin cities' with a combined population of at least 50,000. In addition to the county, or counties, containing such a city or cities, contiguous counties are included in an SMSA if, according to certain criteria, they are essentially metropolitan in character and are socially and economically integrated with the central city. The criteria followed in the delineation of SMSA's relate to a city, or cities, of sufficient population size to constitute the central city and to the economic and social relationships with contiguous counties that are metropolitan in character."

The South Central Region includes Huerfano and Las Animas Counties and the six counties drained by the Rio Grande. Agriculture (principally potato raising and livestock) and coal mining are the main industries.

The East Slope Region includes the strip of counties from Larimer and Weld on the north through Pueblo on the south. The population is highly urbanized with 86.7% living in urban areas. The economy is diversified with manufacturing, agricultural production, mining, tourism, and trade and services contributing to the wealth of the area.

The state is divided into 63 counties, the boundaries of which have remained substantially unchanged since 1913. Historically, contiguous counties have been grouped into representation districts in accordance with a general pattern which is distinguishable since the early days of statehood. Geographical divisions such as mountain ranges and river basins, accessibility, homogeneity, and population all have been recognized. The apportionment of membership to the districts has varied with shifts in population. In the early days of statehood the mining counties were heavily populated. After the turn of the century the increased population of the agricultural counties in the high plains and the decline of the mining counties required changes in apportionment. In more recent years the growth of metropolitan areas has caused a demand for greater representation of the urban centers in the legislature.

Apportionment of the Colorado legislature has not remained static. Legislative revisions occurred in 1881, 1891, 1901, 1909, 1913, and 1953. In 1910, Colorado

adopted a liberal constitutional provision for the initiative and referendum of both "laws and amendments to the constitution."[26] An initiated reapportionment law was passed its own reapportionment law and the conflict between it and the initiated measure went to the Colorado adopted in 1932.[27] At its next session the legislature Supreme Court,[28] which upheld the power of the people to adopt the initiated reapportionment measure, sustained the validity of the initiated reapportionment, and declared the legislative act unconstitutional. In 1954 the voters rejected a referred apportionment measure and in 1956 rejected an initiated constitutional amendment proposing the reapportionment of both chambers of the legislature on a straight population basis.[29]

After the defeat of the 1956 proposal the Governor appointed a commission to study reapportionment. The majority favored action similar to Amendment No. 7 and the minority recommended action substantially the same as the 1956 proposal and Amendment No. 8. Attempts of the legislature to agree on a reapportionment measure failed. An effort to compel apportionment by state court action failed.[30] During the spring of 1962 Amendments 7 and 8 were initiated by petition. Intensive campaigns

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[26]Colo. Const. Art. V, § 1. A constitutional amendment may be initiated by petition of 8% of the legal voters. No geographical distribution of petition signers is required.

[27]Colo. S. L. 1933, Ch. 157, p. 811.

[28]Armstrong v. Mitten, 95 Colo. 425, 37 P.2d 757.

[29]The vote in 1954 was 159,188 against and 116,695 for. The proposal lost in every county. The vote in 1956 was 349,195 against and 158,204 for. The proposal lost in every county except Denver.

[30]In re Legislative Reapportionment, ____ Colo. ____, 374 P.2d 66.

were waged in support of each.[31] The voters adopted Amendment No. 7 and rejected Amendment No. 8.[32]

The choice of the voters is now before the court. By their action they have apportioned the House on a population basis and have recognized other factors in the apportionment of the Senate. Consideration must next be given to the deviations from equality of representation which occur in the apportionment of the Senate.

Appendix C following this opinion contains tables giving, for each of the four regions delineated by the defense experts, the senatorial apportionment under Amendment No. 7, listing constituent counties, the area in square miles, the population, the apportionment of senators and population per senator.

The tables disclose that in the Western Region there are eight senatorial districts to which are apportioned

[31]The witness Edwin C. Johnson, three times Governor and three times United States Senator from Colorado, was one of the sponsors of Amendment No. 7. After mentioning the fact that No. 7 carried in every county and No. 8 lost in every county, he said: "It is very unusual in the annals of Colorado politics that any proposal or candidate receive a plurality in each and every county of this diverse state. Especially as to ballot proposals, there is normally a large built-in negative vote. If people do not understand a proposal, they vote 'no'. I believe that the principal reason for the character of the vote on Amendment 7 is that the issues were very clearly defined, not only by the continuous activities above described from 1953 through 1962, but also in the campaign itself. The proponents of each amendment were highly organized, and they conducted a campaign in every nook and crannie of the state. * * * In addition both proposals were heavily advertised, pro and con, and were the subject of front page editorial treatments by the newspapers of the state. Every communication medium was filled with discussion of this issue for months prior to election day. In short, in these campaigns, the people were intensely interested, fully informed and voted accordingly."

[32]Amendment No. 7 was adopted by a vote of 305,700 to 172,725 (63.89% for and 36.11% against), and carried in every county of the state. Amendment No. 8 lost by a vote of 311,749 to 149,822 (67.54% against and 32.46% for), and was defeated in every county of the state.

eight senators. This region has 13% of the state population, 45.47% of the state area and 20.5% of the senators. There is one senator for each 28,480 persons.

The Eastern Region contains five senatorial districts, to which are apportioned five senators. The region has 8.1% of the state population, 26.21% of the state area and 12.8% of the senators. There is one senator for each 28,407 persons.

The South Central Region contains three senatorial districts, to which are apportioned three senators. The region has 3.8% of the state population, 13.99% of the state area and 7.7% of the Senate membership. There is one senator for each 22,185 persons.

The East Slope Region contains twenty-three senatorial districts, to which are apportioned twenty-three senators. The region has 75.1% of the state population, 14.33% of the state area, and 59.0% of the Senate membership. There is one senator for each 57,283 persons.

The three metropolitan areas of the state have a combined population of 1,191,832 persons or 67.95% of the state total and elect twenty or a majority of the thirty-nine senators. The Denver Metropolitan Area has a population of 929,383 persons or 52.99% of the state total and elects sixteen senators. The City and County of Denver, the central portion of the Denver Metropolitan Area, is allotted eight senators. The suburban portion (Adams, Arapahoe, Boulder, and Jefferson Counties) of the same area is allotted a total of eight senators.

The combination of districts which would result in

the election of a majority of the Senate by the smallest population is reached by taking Boulder County out of the Denver Metropolitan Area and adding it to the non-metropolitan areas. This would result in a population of 636,369 persons or 36.28% of the state total electing a majority of the Senate.

Appendix D to this opinion gives the ratio of the population per senator in each district to the population of the district having the least number of persons represented by a senator. The highest ratio, that of Districts Nos. 11 and 12 over District No. 23, is 3.6 to 1.

The heterogeneous characteristics of Colorado justify geographic districting for the election of the members of one chamber of the legislature. In no other way may representation be afforded to insular minorities. Without such districting the metropolitan areas could theoretically, and no doubt practically, dominate both chambers of the legislature.

The plaintiffs make much of the disparities in senatorial representation which vary downward from 3.6 to 1. They say that the deviations from per capita standards are impermissible. We do not agree. The distributive scheme of Amendment No. 7 may not be perfect but it does recognize the geographic diversities, the historic grouping of counties, and the accessibility of a candidate to the voters and of a senator to his constituents. The realities of topographic conditions with their resulting effect on population may not be ignored. For an example, if the contention of the plaintiffs was to be accepted, Colorado would have one senator for approximately every 45,000 persons. Two contiguous Western Region senator-

ial districts, Nos. 29 and 37, have a combined population of 51,675 persons inhibiting an area of 20,514 square miles.[33] The division of this area into two districts does not offend any constitutional provisions. Rather, it is a wise recognition of the practicalities of life. An analysis of the other senatorial districts in all the regions except the populous East Slope would merely emphasize the point.

We are convinced that the apportionment of the Senate by Amendment No. 7 recognizes population as a prime, but not controlling, factor and gives effect to such important considerations as geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, conformity to historical divisions such as county lines and prior representation districts, and "a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses."[34]

The plaintiffs rest their cases on the argument that the apportionment of the Senate by Amendment No. 7 is arbitrary, invidiously discriminatory, and without any rationality. The voters of Colorado have themselves answered these charges. By adopting Amendment No. 7 and by rejecting Amendment No. 8, which proposed to apportion the legislature on a per capita basis, the electorate has made its choice between the conflicting principles.

The initiative gives the people of a state no power

[33] Each of nine states, Rhode Island, Delaware, Connecticut, Hawaii, New Jersey, Massachusetts, New Hampshire, Vermont, and Maryland contains less area.

[34] W.M.C.A., Inc. v. Simon, S.D.N.Y., 208 F.Supp. 368, 379, probable jurisdiction noted ....U.S...., June 10, 1963 See also Mann v. Davis, E.D.Va., 213 F.Supp. 577, 584, probable jurisdiction noted, ...U.S...., June 10, 1963.

to adopt a constitutional amendment which violates the Federal Constitution. Amendment No. 7 is not valid just because the people voted for it. If the republican form of government principle is not a useable standard because it poses political rather than judicial questions, the observation is still pertinent that Amendment No. 7 does not offend such principle. If the true test is the denial of equal right to due process, we face the traditional and recognized criteria of equal protection. These are arbitrariness, discrimination, and lack of rationality. The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary.

The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. At the most they present a political issue which they lost. On the questions before us we shall not substitute any views which we may have for the decision of the electorate. In Ferguson, Attorney General of Kansas, v. Skrupa, 372 U.S. 726, 731, the Supreme Court said that it refused to sit as a "superlegislature to weigh the wisdom of legislation."[35] Similarly, we decline to act as a superelectorate to weigh the rationality of a method of legislative apportionment adopted by a decisive vote of the people.

[35]Quoted from Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423.

We believe that no constitutional question arises as to the actual, substantive nature of apportionment if the popular will has expressed itself.[36] In Baker v. Carr the situation was such that an adequate expression of the popular view was imposible. In Colorado the liberal provisions for initiation of constitutional amendments permit the people to act — and they have done so. If they become dissatisfied with what they have done, a workable method of change is available. The people are free, within the framework of the Federal Constitution, to establish the governmental forms which they desire and when they have acted the courts should not enter the political wars to determine the rationality of such action.

Each case is dismissed and all parties shall bear their own costs. The findings of Fact and Conclusions of Law of the court are set out in this opinion as permitted by Rule 52(a), F.R.Civ.P. The clerk will forthwith prepare and submit an appropriate form of judgement.

DONE at Denver, Colorado, this ..... day of July, 1963.

BY THE COURT

Jean S. Breitenstein
United States Circuit Judge,
Tenth Circuit

Alfred A. Arraj
Chief Judge, United States
District Court

[36]See McCloskey, "The Reapportionment Case," 76 Harvard Law Review 54, 71-72.

APPENDIX A

INITIATED AMENDMENT No. 7 — 1962 Colo. Gen. Election

"SECTION 1. Sections 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47 and 48 of Article V are adopted, to read as follows:

"Sections 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

"SECTION 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

"Section 47. SENATE. The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more

than one senator, senatorial districts shall be as nearly equal in population as may be.

"Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Section 45, 46 and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the genral election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be as provided by law."

APPENDIX B

INITIATED AMENDMENT No. 8—1962 Colo. Gen. Election

"Sections 45 and 47, Article V, of the Constitution of the State of Colorado, are hereby amended to read as follows:

"Section 45. APPORTIONMENT BY COMMIS-

SION. (A) There shall be established a Commission for Legislative Apportionment composed of three members who shall be qualified electors of the State of Colorado, no more than two of whom shall be of the same political party, to serve for a term of eighteen months from the time of their appointment. One member shall be appointed by each of the following in this order: by the Attorney General prior to June 1, by the Lieutenant Governor prior to June 15 and by the State Board of Education prior to July 1, of each year of appointment. The appointments shall be made prior to July 1, 1963, July 1, 1971, and July 1 of each tenth year thereafter.

"(B) It shall be the duty of the commission to delineate senatorial and representative districts and to revise and adjust the apportionment of senators and representatives among such districts. The commission shall certify to the Colorado Supreme Court the boundaries of the senatorial and representative districts and the reapportionment of senators and representatives on or before January 2, 1964; January 2, 1972, and January 2 of each tenth year thereafter.

"(C) If such delineation and apportionment conforms to the requirements of sections 45 through 47 of this article, the court shall affirm the same. If such delineation and apportionment does not conform to the said requirments, or if for any reason whatever the same is not certified to the court, then the court shall delineate senatorial and representative districts and adjust the apportionment among such districts. The court shall rule on or before April 15 of each year set forth in paragraph ment to become effective on the date of the court's ruling. (B) of this section, with such districting and apportion-

The court shall notify forthwith the secretary of state and the clerk of each county of its ruling.

"(D) The commission shall determine a strict population ratio for the senate and for the house by dividing the total state population as set forth in each decennial United States Census by the number of seats assigned to the senate and house, respectively. No legislative district shall contain a population per senator or representative of 33 1/3% more or less than the strict population ratio, except mountainous senatorial districts of more than 5,500 square miles, where the major portion of the district lies west of the 28th meridian of longitude west from Washington, D.C., but no such senatorial district shall contain a population of less than 50% of the strict population ratio.

"(E) It is the intent that sparsely populated areas shall have maximum representation within the limits set forth in paragraph (D) and that population per legislator in densely populated areas shall be as nearly equal as possible.

"Section 47. SENATORIAL AND REPRESENTATIVE DISTRICTS. (A) Senatorial districts may consist of one county or two or more contiguous counties but no county shall be divided in the formation of a senatorial district.

"(B) Representative districts may consist of one county or two or more contiguous counties; except that any county which is apportioned two or more representatives may be divided into representative sub-districts; provided, that, a majority of the voters of that county

approve in a general election the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large.

"(C) Any proposal to divide a county into subdistricts shall be placed on the ballot only by initiative petition filed with the secretary of state according to the requirements set forth for statewide initiated measures in Article V, Section 1, of this constitution and statutes enacted thereunder; Provided, that, the requirements for the number of signatures and publication shall be determined for that county instead of for the state.

"(D) Subdistricting measures may be placed on the ballot at the general elections of 1966, 1974, and at the general elections held each tenth year thereafter and at no other times. Any such measure shall take effect pursuant to the provisions of Article V, Section 1, of this constitution and shall remain in effect until repealed or revised by the people through another initiated measure, except that when the apportionment of representatives to any subdistricted county is increased or decreased by the commission for legislative apportionment, the commission may, subject to the review provided in Section 45, paragraph (C), of this article, amend the subdistricting in said county as necessary to conform to the new apportionment.

"(E) A candidate for representative in any subdistricted county need not reside in the subdistrict in which he is a candidate.

"(F) No part of any county may be combined with another county or part of another county in the formation of any senatorial or representative district."

APPENDIX C

APORTIONMENT OF THE SENATE BY AMENDMENT NO. 7

(Grouped by Regions)

Sen. Dist.*	Counties	Square Miles		Population		Senators	Population Per Senator
			WESTERN REGION				
24	Chaffee	1,040		8,298			
	Park	2,178		1,822			
	Gilpin	149		685			
	Clear Creek	395		2,793			
	Douglas**	844		4,816			
	Teller	555		2,495			
			5,161		20,909	1	20,909
25	Fremont	1,562		20,196			
	Custer	738		1,305			
			2,300		21,501	1	21,501
27	Delta	1,161		15,602			
	Gunnison	3,243		5,477			
	Hinsdale	1,062		208			
			5,466		21,287	1	21,287

*The districts are numbered as in H.B. 65. Before the adoption of Amendment No. 7, the state was divided into 25 senatorial districts by Colo. Rev. Stat. Ann. § 63-1-3 (1953), and 35 senators were apportioned to those districts. Amendment No. 7 retained the same district boundaries except that Elbert County was removed from the district which included Arapahoe County also and was added to the district previously consisting of Kit Carson, Cheyenne, Lincoln, and Kiowa Counties. Arapahoe was left in a district by itself. The membership in the Senate was increased to 39 by apportioning one additional senator each to the suburban counties of the Denver Metropolitan Area, that is, Adams, Arapahoe, Boulder and Jefferson Counties. Counties apportioned more than one senator were to be divided by the legislature into senatorial districts as nearly equal as may be in population. This division was made by H.B. 65. The action so taken is not at issue in these cases.

**Douglas County is a part of the East Slope Region, but because of its peculiarities is joined with five Western Region counties to form a senatorial district.

Sen. Dists.	Counties	Square Miles		Population		Senators	Population Per Senator
			(WESTERN REGION—cont.)				
29	Rio Blanco	3,264		5,150			
	Moffat	4,761		7,061			
	Routt	2,331		5,900			
	Jackson	1,628		1,758			
	Grand	1,869		3,557			
			13,853		23,426	1	23,426
32	Mesa		3334		50,715	1	50,715
33	Montrose	2,240		18,286			
	Ouray	540		1,601			
	San Miguel	1,284		2,944			
	Dolores	1,029		2,196			
			5,093		25,027	1	25,027
35	San Juan	392		849			
	Montezuma	2,097		14,024			
	La Plata	1,691		19,225			
	Archuleta	1,364		2,629			
			5,544		36,727	1	36,727
37	Garfield	3,000		12,017			
	Summit	616		12,073		1	
	Eagle	1,686		4,677			
	Lake	384		7,101			
	Pitkin	975		2,381			
			6,661		28,249	1	28,249
	Western Region (8 Districts,) (30 Counties)		47,412		227,841	8	28,480
			EASTERN REGION				
28	Logan	1,849		20,302			
	Sedgwick	554		4,242			
	Phillips	680		4,440			
			3,083		28,984	1	28,984

Sen. Dists.	Counties	Square Miles		Population		Senators	Population Per Senator
			(EASTERN REGION—cont.)				
34	Kit Carson	2,171		6,957			
	Cheyenne	1,772		2,789			
	Lincoln	2,593		5,310			
	Kiowa	1,794		2,425			
	Elbert	1,864		3,708			
			10,194		21,189	1	21,189
36	Yuma	2,383		8,912			
	Washington	2,530		6,625			
	Morgan	1,300		21,192			
			6,213		36,729	1	36,729
38	Otero	1,276		24,128			
	Crowley	812		3,978			
			2,088		28,106	1	28,106
39	Bent	1,543		7,419			
	Prowers	1,636		13,296			
	Baca	2,565		6,310			
			5,744		27,025	1	27,025
	Eastern Region (5 Districts,) (16 Counties)		27,322		142,033	5	28,407
			SOUTH CENTRAL REGION				
23	Las Animas		4,798		19,983	1	19,983
30	Huerfano	1,580		7,867			
	Costilla	1,220		4,219			
	Alamosa	723		10,000			
			3,523		22,086	1	22,086

Sen. Dists.	Counties	Square Miles	Population	Senators	Population Per Senator
	(SOUTH CENTRAL REGION—cont.)				
31	Saguache	3,146	4,473		
	Mineral	923	424		
	Rio Grande	916	11,160		
	Conejos	1,274	8,428		
		6,259	24,485	1	24,485
	South Central (3 Districts,) (8 Counties)	14,580	66,554	3	22,185
	EAST SLOPE REGION				
1-8	Denver	73	493,887	8	61,736
9-10	Pueblo	2,414	118,707	2	59,353
11-12	El Paso	2,159	143,742	2	71,871
13-14	Boulder	758	74,254	2	37,127
15-16	Weld	4,033	72,344	2	36,172
21-22	Jefferson	791	127,520	2	63,760
26	Larimer	2,640	53,343	1	53,343
19-20	Arapahoe	815	113,426	2	56,713
17-18	Adams	1,250	120,296	2	60,148
	East Slope (23 Districts,) (9 Counties)	14,933	1,317,519	23	57,283

Areas	Square Miles	Population	Senators	Population Per Senator
Colorado (39 Districts,) (63 Counties)	104,247	1,753,947	39	44,973
Denver Metropolitan Area (Denver, Boulder, Jefferson, Arapahoe and Adams Counties) (16 Districts,) (5 Counties)	3,687	929,383	16	58,086
All Standard Metropolitan Statistical Areas ("Denver"—Adams, Arapahoe, Boulder, Denver and Jefferson Counties; "Colorado Springs"—El Paso County; and "Pueblo"—Pueblo County) (20 Districts) (7 Counties)	8,260	1,191,832	20	59,592

APPENDIX D

RATIO OF POPULATION PER SENATOR IN EACH DISTRICT TO THE POPULATION OF THE DISTRICT HAVING THE LEAST NUMBER OF PERSONS REPRESENTED BY A SENATOR

(Grouped by Regions)

District	Population Per Senator	Least Population Per Senator	Ratio
	WESTERN REGION		
24	20,909	19,983	1.0-1
25	21,501	19,983	1.1-1
27	21,287	19,983	1.1-1
29	23,426	19,983	1.2-1
32	50,715	19,983	2.5-1
33	25,027	19,983	1.3-1
35	36,727	19,983	1.8-1
37	28,249	19,983	1.4-1
	EASTERN REGION		
28	28,984	19,983	1.5-1
34	21,189	19,983	1.1-1
36	36,729	19,983	1.8-1
38	28,106	19,983	1.4-1
39	27,025	19,983	1.4-1
	SOUTH CENTRAL REGION		
23	19,983	19,983	1.1-1
30	22,086	19,983	1.1-1
31	24,485	19,983	1.2-1

District	Population Per Senator	Least Population Per Senator	Ratio
	EAST SLOPE REGION		
1-8	61,736	19,983	3.1-1
9-10	59,353	19,983	3.0-1
11-12	71,871	19,983	3.6-1
13-14	37,127	19,983	1.9-1
15-16	36,172	19,983	1.8-1
21-22	63-760	19,983	3.2-1
26	53,343	19,983	2.7-1
19-20	56,713	19,983	2.8-1
17-18	60,148	19,983	3.0-1

Appendix B(1)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7501

ARCHIE L. LISCO, and all other registered voters of the Denver Metropolitan Area, State of Colorado, similarly situated,

Plaintiffs,

v.

JOHN LOVE, as Governor of the State of Colorado, HOMER BEDFORD, as Treasurer of the State of Colorado, Byron Anderson, as Secretary of the State of Colorado, THE STATE OF COLORADO and THE FORTY-FOURTH GENERAL ASSEMBLY THEREOF,

Defendants.

Civil Action No. 7637

WILLIAM E. MYRICK, JOHN CHRISTENSEN, ED SCOTT, GORDON TAYLOR, HENRY ALLARD, ANDRES LUCAS, JOHN L. KANE, WILLIAM J. WELLS, FRANK A. CARLSON, WILLIAM EPPINGER, ALLEN L. WILLIAMS, RUTH S. STOCKTON, KENNETH FENWICK, CHESTER HOSKINSON, and JOE B. LEWIS, individually and as citizens of the State of Colorado, residents in the Counties of Adams, Arapahoe, and Jefferson, and taxpayers and voters in the State of Colorado, for themselves and for all other persons similarly situated,

Plaintiffs,

v.

THE FORTY-FOURTH GENERAL ASSEMBLY of the State of Colorado, JOHN LOVE, as Governor of the State of Colorado, HOMER BEDFORD, as Treasurer of the State of Colorado, and BYRON ANDERSON, as Secretary of State of the State of Colorado,

Defendants.

Civil Actions No. 7501 and No. 7637

EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING, and WILBUR M. WALTER, individually and as citizens, residents and taxpayers of the State of Colorado, on behalf of themselves and for all persons similarly situated,

Intervenors.

Filed United States District Court, Denver, Colorado July 16, 1963
G. Walter Bowman, Clerk

Francis R. Salazar and Carl Harthun, Attorneys at at Law, 304 Denver-U. S. National Center, 1700 Broadway, Denver 2, Colorado, for Plaintiffs in Civil Action No. 7501.

George Louis Creamer and Charles Ginsberg, Attorneys at Law, 928 Equitable Building, Denver 2, Colorado, for Plaintiffs in Civil Action No. 7637.

Honorable Duke W. Dunbar, Attorney General for the State of Colorado, Richard W. Bangert, Assistant Attorney General for the State of Colorado, 104 State Capitol, Denver 2, Colorado; Anthony F. Zarlengo and V. G. Seavy, Jr., Attorneys at Law, 630 Majestic Building, Denver 2, Colorado, for Defendants in Civil Actions No. 7501 and No. 7637.

Richard S. Kitchen, Charles S. Vigil and Harvey Williams, Attorneys at Law, 2155 First National Bank Building, Denver 2, Colorado, for Intervenors in Civil Actions No. 7501 and No. 7637.

Phillip J. Carosell, Attorney at Law, 430 Majestic Building, Denver 2, Colorado, Amicus Curiae in Civil Actions No. 7501 and No. 7637.

Before BREITENSTEIN, Circuit Judge, and ARRAJ and DOYLE, District Judges.

DOYLE, District Judge, dissenting.

Our concern here is not with the desirability as a matter of policy of a Senate which is controlled by a minority of voters, nor are we concerned with the extent of voter approval which resulted in adoption of Amendment No. 7. The issue for determination is whether the disparities described in the majority opinion, which will be further discussed here, are so substantial and irrational as to constitute invidious discrimination so as to violate the equal protection of the laws, Fourteenth Amendment of the Constitution of the United States.

Prior to the adoption of Amendment No. 7, and on August 10, 1962, this Court issued its per curiam opinion recognizing the equal protection clause as the criterion, finding gross disparities and holding the disparities to be of sufficient magnitude to make out a *prima facie* case of invidious discrimination. At the same time final adjudication was postponed pending a further hearing and because of the impendency of the election at which the competing measures were on the ballot. Subsequently, Amendment No. 7 was approved by a majority of the voters of the State. And so, the question is whether the gross disparities — invidious discrimination, was remedied by the adoption of Amendment No. 7; or whether the evidence at the trial showed the existence of a rational basis whereby the discriminations were no longer to be regarded as invidious.

Does Amendment No. 7 remedy the gross and glaring disparity in voting strength which is described and characterized in our prior opinion? Amendment No. 7 provides for a House of Representatives composed of sixty-five members from sixty-five districts which shall be as nearly equal in population as may be. This provision re-

moved the population disparities which existed in the House of Representatives under the old law.[1]

In the Senate, Amendment No. 7 declares that the State shall be divided into thirty-nine senatorial districts, one senator from each district. It further declares that the apportionment of senators among the counties shall be the same as now provided by 63-1-3, Colorado Revised Statutes 1953. Four senators are added, or a total of thirty-nine, as compared with thirty-five under the old law, and one each of these additional senators is apportioned to Adams, Arapahoe, Boulder and Jefferson counties. Further, the amendment freezes the apportionment of the various districts except for a provision permitting a review of counties apportioned more than one senator following each federal census. It is thus apparent then that Amendment No. 7, while apportioning the House on a population basis, retains the old system, that which we previously condemned, except that it gives a senator for each of four populous metropolitan counties. It is clear, therefore, that no real effort has been made to cure the disparities which existed under the old law; on the contrary, these disparities are perpetuated by writing them into the Constitution of Colorado, the only relief being somewhat of a reduction of disparity in four of the sixty-three counties in the State.

The ultimate question is, therefore, the second one posed above, which is, whether the defendants and respondents have offered evidence establishing that the disparities are non-invidious.

Although a number of federal courts have now indi-

[1] 63-1-2, 63-1-6, Colorado Revised Statutes 1953.

cated at least one house must be apportioned on a per capita basis,[2] there is little authority holding that the upper house may or may not be organized upon a wide disparity of population basis.[3] It would appear that there is no logical basis for distinguishing between the lower and the upper house — that the equal protection clause applies to both since no valid analogy can be drawn between the United States Congress and the State. See *Gray v. Sanders*, 83 S. Ct. 801 (1963) ———U.S.———. So, until there is some authoritative ruling to the contrary, we must assume that equality of voting power is demanded with respect to both houses.

It is to be conceded that the Fourteenth Amendment does not require absolute equality. This is apparent from the opinion of Mr. Justice Douglas;[4] in other words, some other factors may be taken into account. It would seem, however, that this is in recognition of the fact that perfect exactness as to the number of inhabitants of each electoral district is a practical impossibility.[5] Beyond this, however, fairness requires that every individual be guaranteed the right to cast an effective vote.[6]

Although the Supreme Court in *Gray v. Sanders*,

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[2]**Toombs v. Fortson**, (D.C. N.D.Ga., 1962) 205 F. Supp. 248; **Baker v. Carr**, (D.C. M.D.Tenn., 1962) 206 F. Supp. 341; **Sims v. Frink**, (D.C. M.D.Ala.,N.D. 1962) 205 F. Supp. 245; **Caesar v. Williams**, (Idaho, 1962) 371 P. 2d 241; **Sincock v. Duffy**, (D.C. D.Del., 1963) 215 F. Supp. 169.

[3]**Scholle v. Hare**, 367 Mich. 176, 116 N.W.2d 350 (1962), holding a statute which gave citizens of one district twice the voting strength of citizens of another district while voting for the State Senate to be invidiously discriminatory. See also **Thigpen v. Meyers**, (D.C. W.D. Wash. N.D. 1962) 211 F. Supp. 826, and **Sincock v. Duffy**, supra.

[4]**Baker v. Carr**, supra.

[5]See, for example, **State v. Sathre**, 113 N.W. 2d 679, (N.Dak. 1962); **Wisconsin v. Zimmerman**, 209 F. Supp. 183 (D.C. W.D. Wis. 1962).

[6]**Moss v. Burkhart**, 207 F. Supp. 885 (W.D. Okla. 1962); **Thigpen v. Meyers**, supra.

supra, did not have before it the present question, it nevertheless expressed the philosophy of non-dilution of the vote of the individual citizen. It extracted this philosophy not only from the Constitution, but from the history of the United States, and it is to be concluded therefrom that a properly apportioned state legislative body must at least approximate by bona fide attempt the creation of districts substantially related to population. In *Sincock v. Duffy*, 215 F. Supp. 169, it was said:

> "Such affirmative action must be rendered possible and, as we have already indicated, an apportionment should not be permitted that would allow a blockage of major legislation desired by the great majority of electors of Delaware to come to pass in the Senate. *Effecting the will of the majority of the people of a State must be deemed to be the foundation of any apportionment plan,* * * * " (Emphasis supplied)

Even if we assume that the factors which have been given weight in the majority opinion are properly to be considered, nevertheless, the disparities which exist in Amendment No. 7 cannot be rationalized. Criteria such as were applied by the majority here were used in the case of *W.M.C.A. Inc v. Simon* (D.C. So.D. N.Y., 1962), 208 F. Supp. 368. Disparities in the New York law were relatively slight. New York City, for example, having 46 per cent of the state's population, has shown to have had 43.1 per cent of the total number of senators. The ten most populous counties are shown to have had 65.5 percent control of the Senate. The factors approved in *W.M.C.A.*, supra, for determining whether or not invidious discrimination existed, were the following:

"(1) Rationality of state policy and whether or not the system is arbitrary.

"(2) Whether or not the present complexion of the legislature has a historical basis.

"(3) Whether there lies within the electorate of the State of New York any possible remedy (if gross inaqualities exist.)

"(4) Geography, including accessibility of legislative representatives to their electors.

"(5) Whether the Court is called upon to invalidate solemnly enacted State Constitutions and laws." 208 F. Supp. at 374.

Applying these factors, or tests in the present case, produce a result different from that which obtained in *W.M.C.A.*

1. *Rational or Arbitrary?*

Amendment No. 7 was not adopted upon a basis of recognizing geographic, topographic and economic differences. As shown above, Amendment No. 7 arbitrarily froze existing apportionment and at the same time furnished one additional senator to each of four populous metropolitan counties by writing into the Colorado organic law disparities which had long existed and which we held were gross. It cannot be said that it was irrational. The unpleasant truth is that it was particularly designed and dictated not by factual differences, but rather by political expediency. Simplicity and success at the polls overrode considerations of fairness and justice. Thus, Amendment No. 7 fails the test of rationality in its adoption.

2. *Historic Factors.*

The presence of an historical basis has been persuasive in a number of instances.[7] We must be mindful of the fact however, that the present rash of reapportionment litigation is the result of an historical fact; namely, that the several states were in the past predominantly rural. The failure of legislative bodies to recognize population shifts and social changes has produced the present problem. So, therefore, the fact that legislative districts have historic significance has little value in determining what constitutes invidious discrimination. This is particularly true in Colorado, the character of which has substantially changed. The language contained in the opinon of the Court in *Toombs v. Fortson* (D.C. N.D. Ga., 1962), 205 F. Supp. 248, is pertinent:

> "Applying these historical facts to the test of invidiousness, we are unable to discern any justification for continuing this system merely because it has an historical basis in Georgia's political institutions. This is so, primarily, because while historically the statute and constitutional requirements remain substantially the same, the passage of time and changing living habits of the people have distorted it into something entirely different from what it was at its genesis."

It is difficult to see how history can be of value other than for an explanation of disparities — it can not justify them.

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[7] **W.M.C.A. Inc. v. Simon** (D.C So.D.N.Y., 1962), 208 F. Supp. 368; **Maryland Committee for Fair Representation, et al. v. Tawes,** 229 Md. 406, 184 A. 2d 715 (1962); **Sobel v. Adams,** (D.C. S.D. Fla. 1963) 214 F. Supp. 811.

3. *Alternative Remedies.*

The majority were impressed by the argument that the initiative in Colorado is relatively easy so that the voters could readily change the Constitution if the inequities became oppressive. Here again, it is of little consolation to an individual voter who is being deprived of his rights that he can start a popular movement to change the Constitution. This possible remedy is not merely questionable, it is for practical purposes impossible. This was recognized by the United States District Court for the District of Nebraska in *League of Nebraska Municipalities v. Marsh*, (D.C. D. Nebr., 1962) 209 F. Supp. 189, where it was said:

> "To say that such a remedy is adequate for one ordinary voter, and we are here concerned with the rights of an individual voter, for concededly one ordinary voter could maintain this action, is being impractical. In addition, the expense of putting an initiated proposal on the ballot in Nebraska is prohibitave for the ordinary voter."

4. *Geography and Economics.*[8]

Much emphasis is placed on Colorado's heterogeneous topography, sparce settlement of mountainous areas, inaccessibility of some communities, and the great distances as justifying the disproportion. In order to soften the impact resulting from population disparities in the districts, the opinion makes comparisons of various regions

[8](Although economics have not been considered as a factor in **W.M.C.A. v. Simon**, supra, the majority opinion has stressed it and it is undoubtedly to be considered.)

rather than comparisons of senatorial districts. Such realignment is not, of course, valid, but even this approach shows disparities which are gross and glaring. The majority's Western Region has on the average a population of 28,480 per senator as against the South Central's 22,185 and the East Slope's 57,283.[9] Since disparities of 2-to-1 and 2-½-to-1 are sufficiently substantial as to be invidious this glossing, or cloaking and juggling of districts technique fails to camouflage the facts and does not diminish the disportion. The case could be different if the farmers had developed the scheme of Amendment No. 7 as a preconceived plan — part of good faith effort to balance off these geographic factors. Such is not the case. Instead, Amendment No. 7 is the product of a mechanical and arbitrary freezing accomplished by adoption, with slight modification of the unlawful alignments which had existed in the previous statute.[10]

The tendered explanation for a 3.6-to-1 and sometimes 3-to-1, and often 2-to-1 disparity between voting strength on the ground that "in no other way may representation be afforded to insular minorities," carries little weight when considered in the light of modern methods of electronic communication, modern highways, automobiles and airplanes. When a man had to ride on horseback from his constituency to the capital, or to settlements within his district, there might have been valid basis for the geographic factors which are here weighted so heavily. Under the circumstances of the present there can be but little consideration given to this geographic factor. Distances

[9]See Exhibit "C" of the majority opinion.

[10](Cf. **Scholle v. Hare**, supra, wherein the amalgamation of contiguous counties supposedly having similar interests was without serious regard for population differences between districts. This was condemned.)

as the crow flies now have little relevance in formulating electoral districts.

Economics has also been given great weight by the majority. The practical difficulties in giving effect to economic factors are mentioned in *Moss v. Burkhart*, 207 F. Supp. 885 (appendix). The major difficulty is that the economic institutions in a dynamic society change rapidly. Certain industries such as mining in Colorado, rise and fall in a few short years and political institutions must be devised to withstand the ravages of time and change. It is foolish to say that because an area sustained a substantial mining industry at some previous time, it deserves greater representation today; or, because one area has cattle or a surplus of water, that it deserves greater representation. The folly of this kind of reasoning is at once apparent. Governments are devised to arrange the affairs of men. Economic interests are remarkably well represented without special representation. It is dangerous to build into a political system a favored position for a segment of the population of the state. There exists no practical method or ridding ourselves of them, and long after the institutions pass, the built-in advantage remains even though it is at last only a vestige of the dead past.[11]

5. *Whether solemnly enacted state laws must be invalidated.*

There is, of course, a presumption of validity which attaches to any enactment, and the presumption is undoubtedly stronger when the law is a constitutional amendment adopted by vote of the people. This presumption

[11] (See **Moss v. Burkhart**, supra.)

does not, however, have the strength attributed to it by the majority when it says:

> "The plaintiffs rest their case on the argument that the apportionment of the Senate by Amendment No. 7 is arbitrary, invidiously discriminatory, and without any rationality. The voters of Colorado have themselves answered these charges. * * *"

And again, they say:

> "* * * The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves apalls rather than convinces. * * *"

And finally:

> "The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. * * * "

The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint we can not, true to our oath, uphold such legislation in the face of palpable infringement of rights. Thus, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet not one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote. [12] Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are

[12] (**Moss v. Burkhart**, supra, and **Thigpen v. Meyers**, cited supra.)

to be protected against the will of the majority.[13] The rights which are here asserted are the rights of the individual plaintiffs to have their votes counted equally with those of other voters. This factor the majority seems to have lost sight of. The opinion even refuses to recognize that the equal protection clause is the applicable standard when it declares:

> "* * * by majority process the voters have said that minority process in the senate is what they want."

The opinion in still another place states:

> "If we reject the republican form of government standard as a basis for judicial action, we are left with the Due Process Clause to support an assertion of denial of equal protection upon the theory that unequal representation denies equal protection because minority process is not due process."

This confusion of the equal protection and due process clauses, plus lamenting the fact that the republican form of government is not the test, must be attributed to a desire and a search for a more flexible basis. The fact is that the equal protection and due process clauses of the Fourteenth Amendment are not coextensive and coterminous.[14] The equal protection clause is an independent limitation on state action which is in no way dependent upon the due process clause. It is straightforward and exacting in its requirements that the rights of all citizens shall be equated upon an equal scale under the law; laws

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[13] **Baker v. Carr** (D.C. M.D. Tenn., 1962) 206 F. Supp. 341; **Sincock v. Duffy** (D.C. D.Del., 1963) 215 F. Supp. 169; **Brunson v. Board of Trustees of School District No. 1** (D.C. E.D.So. Car., 1962) 30 F.R.D. 369.

[14] **Bolling v. Sharpe**, 347 U.S. 497, 74 S. Ct. 693.

which grant preferences are thus repugnant. It is impossible to justify substantial differences between voting rights accorded to voters who live in the mountains, for example, as opposed to those who reside in the cities, and any attempts to rationalize on the basis of geography, sociology or economics will, as has been shown above, necessarily rest upon the subjective evaluation of the minds which attempt the rationalization. Moreover, to say that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve. It is no answer to say that the approval of the polling place necessarily evidences a rational plan. The plaintiffs have a right to expect that cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice.

I do not say that a rational plan can not be devised which is not based upon strict numerical equality. It is enough to say that the instant plan, with its gross and glaring inequalities, is not based upon a rational formula or upon any formula which is apparent. Moreover, a plan which builds into the state organic law senatorial districts which are designed to be static in perpetuity, regardless of population changes, is doomed to obsolesence before it becomes effective.

Amendment No. 7 violates the Constitution of the United States and is, therefore, invalid and void. Amended Section 46 of Amendment No. 7, which redistricts the House of Representatives, can not be severed from Amended Section 46, and hence the entire Amendment is void. I would so hold.

Appendix C

CHAPTER 63

GENERAL ASSEMBLY

* * * * *

ARTICLE I

Membership

* * * * *

63-1-1. *Members of general assembly.*—The senate of general assembly of the state of Colorado shall consist of thirty-five members, and the house of representatives thereof shall consist of sixty-five members. No senatorial or representative district shall embrace the same territory within any other senatorial or representative district, respectively.

* * * * *

63-1-2. *Ratios fixed and established.*—The following ratios are hereby fixed and established for the apportionment of senators and representatives of the general assembly.

(1) The ratio for the apportionment of senators shall be:

(a) One senator for each senatorial district for the first nineteen thousand of population therein;

(b) One additional senator for each senatorial district for each additional fifty thousand of population therein or fraction over forty-eight thousand.

(2) The ratio for the apportionment of representatives shall be:

(a) One representative for each representative district for the first eight thousand of population therein;

(b) One additional representative for each additional twenty-five thousand five hundred of population therein, or fraction over twenty-two thousand four hundred.

Source: L. 53, p. 120, § 2.

* * * * *

63-1-3. *Senatorial districts.*—The state of Colorado shall be divided into twenty-five senatorial districts, numbered and entitled to the number of senators, as follows:

The city and county of Denver shall constitute the first senatorial district and be entitled to eight senators.

The county of Pueblo shall constitute the second senatorial district and be entitled to two senators.

The county of El Paso shall constitute the third senatorial district and be entitled to two senators.

The county of Las Animas shall constitute the fourth senatorial district and be entitled to one senator.

The county of Boulder shall constitute the fifth senatorial district and be entitled to one senator.

The counties of Chaffee, Park, Gilpin, Clear Creek, Douglas and Teller shall constitute the sixth senatorial district and be entitled to one senator.

The county of Weld shall constitute the seventh senatorial district and be entitled to two senators.

The county of Jefferson shall constitute the eighth senatorial district and be entitled to one senator.

The counties of Fremont and Custer shall constitute the ninth senatorial district and be entitled to one senator.

The county of Larimer shall constitute the tenth senatorial district and be entitled to one senator.

The counties of Delta, Gunnison and Hinsdale shall constitute the eleventh senatorial district and be entitled to one senator.

The counties of Logan, Sedgwick and Phillips shall constitute the twelfth senatorial district and be entitled to one senator.

The counties of Rico Blanco, Moffat, Routt, Jackson and Grand shall constitute the thirteenth senatorial district and be entitled to one senator.

The counties of Huerfano, Costilla and Alamosa shall constitute the fourteenth senatorial district and be entitled to one senator.

The counties of Saguache, Mineral, Rio Grande and Conejos shall constitute the fifteenth senatorial district and be entitled to one senator.

The county of Mesa shall constitute the sixteenth senatorial district and be entitled to one senator.

The counties of Montrose, Ouray, San Miguel and Dolores shall constitute the seventeenth senatorial district and be entitled to one senator.

The counties of Kit Carson, Cheyenne, Lincoln and Kiowa shall constitute the eighteenth senatorial district and be entitled to one senator.

The counties of San Juan, Montezuma, La Plata and Archuleta shall constitute the nineteenth senatorial district and be entitled to one senator.

The counties of Yuma, Washington and Morgan shall constitute the twentieth senatorial district and be entitled to one senator.

The counties of Garfield, Summit, Eagle, Lake and Pitkin shall constitute the twenty-first senatorial district and be entitled to one senator.

The counties of Arapahoe and Elbert shall constitute the twenty-second senatorial district and be entitled to one senator.

The counties of Otero and Crowley shall constitute the twenty-third senatorial district and be entitled to one senator.

The county of Adams shall constitute the twenty-fourth senatorial district and be entitled to one senator.

The counties of Bent, Prowers and Baca shall constitute the twenty-fifth senatorial district and be entitled to one senator.

* * * * *

63-1-4. *Election of senators.*—Four senators shall be elected from the first senatorial district and one each from the second, third, sixth, seventh, tenth, twelfth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, twentieth and twenty-fifth districts at the general election held in November, 1954, and every four years thereafter.

Four senators shall be elected from the first senatorial district and one each from the second, third, fourth, fifth, seventh, eighth, ninth, eleventh, thirteenth, nineteenth, twenty-first, twenty-second, twenty-third, and twenty-fourth districts at the general election held in November, 1956, and every four years thereafter.

* * * * *

63-1-5. *Senators keep office—vacancies.*—Nothing in this article shall be construed to cause the removal of any senator from his office for the term for which he has been elected, but all such senators shall serve the term for which they were elected; provided, that in case of a vacancy caused by the death, resignation or otherwise of any such senator or senators, the vacancy shall be filled as provided by law from the new district as provided for in this article.

Source: L. 53, p. 122, § 5.

* * * * *

63-1-6. *Members of house of representatives.*—The members of the house of representatives shall be divided among the several counties of the state as follows:

The city and county of Denver shall have seventeen.

The county of Pueblo shall have four.

The county of Weld shall have three.

The county of El Paso shall have three.

The county of Las Animas shall have one.

The county of Boulder shall have two.

The county of Larimer shall have two.

The county of Arapahoe shall have two.

The counties of Crowley and Otero shall have two.

The county of Mesa shall have two.

The county of Delta shall have one.

The county of Huerfano shall have one.

The county of Jefferson shall have two.

The county of Logan shall have one.

The county of Morgan shall have one.

The county of Adams shall have two.

The county of Yuma shall have one.

The counties of Washington and Kit Carson shall have one.

The counties of Prowers and Baca shall have one.

The counties of Routt, Moffat, Grand and Jackson

shall have one.

The counties of Montrose and Ouray shall have one.

The counties of San Miguel, Dolores and Montezuma shall have one.

The counties of La Plata and San Juan shall have one.

The counties of Hinsdale, Gunnison and Saguache shall have one.

The counties of Rio Grande and Mineral shall have one.

The counties of Conejos and Archuleta shall have one.

The counties of Alamosa and Costilla shall have one.

The counties of Fremont and Custer shall have one.

The counties of Park, Teller, Douglas and Elbert shall have one.

The counties of Lake and Chaffee shall have one.

The counties of Eagle, Pitkin, Summit, Clear Creek and Gilpin shall have one.

The counties of Rio Blanco and Garfield shall have one.

The counties of Sedgwick and Phillips shall have one.

The counties of Cheyenne and Lincoln shall have one.

The counties of Kiowa and Bent shall have one.

* * * * *

63-1-7. *Representatives keep office — biennial elections.*—Nothing in this article shall be construed to cause the removal of any representative from his present term of office, and representatives shall be elected under the provisions of this article beginning with the general election held in November, 1954, and every two years thereafter.

* * * * *

63-1-8. *New counties.*—In the event that any new county is created at any time after the passage of this article, and the legislature has not provided for the attaching of said new county to a specifically memtioned district, then such new county shall be deemed to be in the senatorial or representative district that said territory was in prior to its creation.